Supreme Court, U. S.
FILED
MAR 17 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-1440

PAUL S. ADAMIAN,
Petitioner

vs.

DR. LOUIS E. LOMBARDI, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CHARLES E. SPRINGER
333 Flint Street
Reno, Nevada 89501
(702) 323-2728
Attorney for Petitioner

BOWNE-PERNAU WALSH • 1045 SANSOME ST. • S.F., CA 94111 • (415) 981-7882

SUBJECT INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	4
Statement of the case	4
Reasons for granting the writ	14
1. Petitioner had been denied his right of appeal, and his right of recourse to the courts. Law of the case doctrine	14
2. Court of Appeals ruling on facial invalidity is patently erroneous and should not be allowed to stand as the law of the circuit	15
Conclusion	18

TABLE OF AUTHORITIES CITED

Cases

	Page
Adamian v. Jacobsen, 523 F.2d 929 (1975)	1, 2, 10, 11, 16
Broadrick v. Oklahoma, 413 U.S. 601 (1973)	16, 17
Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)	17
Electrical Research Products v. Gross, 120 F.2d 301 (9th Cir. 1941)	15
Gooding v. Wilson, 405 U.S. 518 (1972)	17, 18
Jablon v. Trustees of California State Colleges, 482 F.2d 997 (9th Cir. 1973)	16
Lanzetta v. New Jersey, 306 U.S. 451 (1939)	17
Nucor Corp. v. Tennessee Forging Steel Service, Inc., 513 F.2d 151 (8th Cir. 1975)	15
Richardson v. Board of Regents, 70 Nev. 144, 261 P.2d 515 (1953)	9, 10, 16

Statutes

28 U.S.C. Section 1254(1)	2
Section 1292	4
42 U.S.C. Section 1971 et seq.	4
Section 1983	4

Rule

Federal Rules of Civil Procedure, Rule 54(b)	4, 8

Constitution

United States Constitution:	
First Amendment	4, 8, 12
Fourteenth Amendment	4, 8

Other Authorities

American Association of University Professors Advisory Letter No. 11 (1963)	9
University Code of the University of Nevada, Chapter IV, Section 2.3	5, 6, 8, 9, 11, 12, 14, 16

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No.

PAUL S. ADAMIAN,
Petitioner

VS.

DR. LOUIS E. LOMBARDI, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Paul S. Adamian, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding and the denial of the petition for rehearing entered December 18, 1979.

OPINIONS BELOW

The opinion of the Court of Appeals of which petitioner seeks review is reported at 608 F.2d 1224; a copy of which is presented as Appendix H. A previous opinion of the Court of Appeals in this matter, Adamian v. Jacobsen, 523

F.2d 929, is appended as Appendix E. The District Court's opinions are unreported. Copies are appended as Appendices. The denial of the petition for rehearing entered December 18, 1979, is also unreported and is attached as Appendix I.

JURISDICTION

The Court of Appeals' judgment was entered on October 16, 1979. A petition for rehearing was denied on December 18, 1979. This petition is being filed within 90 days of said date. This Court has jurisdiction to review the judgment in question by writ of certiorari pursuant to 28 USC § 1254(1).

QUESTIONS PRESENTED

1. Petitioner in a disciplinary trial by a hearing committee was found not to have committed acts which gave adequate cause for dismissal. The governing board disagreed, held its own hearing, heard testimony from its own members who had witnessed the event out of which accusations arose, had its counsel present at the hearing, refused to let Petitioner or his counsel attend or confront and cross examine witnesses, made contrary decisions to the Hearing Committee on witness credibility and other matters and ordered Petitioner dismissed. Petitioner raised all of these matters as due process issues before the Court of Appeals. The Court of Appeals refused to consider the issue of denial of due process.

QUESTION: May the Court of Appeals deny to an Appellant his right to have decided important and substantial due process issues which are dispositive of his right to retention as a tenured professor?

2. A statute in the form of a University code provision was declared to be and is conceded to be facially vague and overbroad. On appeal from summary judgment on the issue the Court of Appeals remanded with instructions "to determine whether the regents' construction of Section 2.3 is the same as that of the American Association of University Professors," as expressed in a 1963 advisory letter.

QUESTION: Are the individual regents or the Nevada Courts the authoritative agency to construe statutes in the form of a University Code; and if the regents have authority to make such construction, is it binding when made years after the "extramural utterances" complained of were engaged in?

3. One of the regents on the University governing board testified under oath that the regents' actions in trying Petitioner before the regents, *in absentia,* were "motivated by desire to punish" the progressor and thereby "to discourage further war protests at the University."

QUESTION: After acquittal of charges arising out of war protest by a Hearing Committee empanel to try accused college professor, does the governing board of the University have the power to retry the professor in the presence of a direct, unretracted statement by a member of the board that the board was motivated by a desire to punish, deter and discourage further war protests at the University?

4. A limiting construction by the AAUP is held to have cured facial invalidity. The limiting construction construed the portion of the statute dealing with "appropriate re-

straint." Petitioner was found to have failed to respect the opinions of others, another part of the statute. The interpretation of "appropriate restraint" can hardly be claimed to cure the vagueness of failure to "respect the opinions of others."

QUESTION: May a limiting construction on one portion of a statute cure vagueness and overbreadth of another portion of the statute?

5. Summary Judgment was entered in favor of Petitioner on July 20, 1973. Time for appeal ran 30 days thereafter. On August 30, 1973, the District Court entered a Rule 54(b) Order restating the July 20, 1973 Order. Respondents filed notice of appeal on the same day contending that the appeal time started over again.

QUESTION: Under 28 U.S.C. § 1292 does the time for filing an appeal commence again after the filing of a restated Rule 54(b) order in the form appended?

STATUTES INVOLVED

The statutes involved are these.

1. The First Amendment to the Constitution of the United States and the Fourteenth Amendment of the Constitution of the United States;

2. 42 U.S.C. § 1983; 42 U.S.C. § 1971 et seq.;

3. 28 U.S.C. § 1292.

STATEMENT OF THE CASE

About ten years ago, Professor Paul Adamian participated in a University approved demonstration protesting the Kent State deaths and the Vietnamese war.

Two members of the University of Nevada (Regent Anderson and Regent Hug, now Judge Hug of the Ninth Circuit Court of Appeals) witnessed the event and were particularly outraged by a delay in the V.I.P. military motorcade which delay they believed to be caused by Adamian.

The outcome was that out of the many students and professors engaged in the demonstration, Adamian alone was charged with violating Chapter IV, Section 2.3 of the University Code which reads:

> "The faculty member is a citizen, a member of a learned profession, and a representative of the University. When he speaks or writes as a citizen, he will be free from University censorship or discipline, but his special position in the community imposes special obligations. As a man of learning and as an educator, he know that the public may judge his profession and this University by his utterances. At all times, he strives to be accurate, to exercise appropriate restraint, to show respect for the opinion of others, and to make every effort to indicate that he is not a spokesman for this University."

The two specifications of the general charge were that Adamian was part of an "attempt to stop a motorcade" and that he "did participate in the disruption of the (ROTC) ceremony."

In accordance with the University Code a special Hearing Committee was impanelled to try Adamian.

After the trial, the Hearing Committee concluded that any delay in the motorcade occasioned by Adamian was necessary to avoid "threatened bodily injury" by motorcade

vehicles' traversing a pedestrian way and that these actions "do not violate the University Code."

The nature and result of the trial are best exemplified in the words of the Committee:

> "The committee at the time of the hearing on October 13, 1970, and in this review, based its examination of the facts and its interpretation of the facts on the testimony which was presented to it. The committee considered all of the evidence that was presented and it considered the *credibility of the witnesses* in the context of the hearing. The committee's decision in cases of conflict are based on the preponderance of the evidence. If facts existed which would justify the termination of Dr. Adamian under the university code, it is the opinion of the committee that those facts were not presented to it for its consideration at the hearing." (Our emphasis)

Referring to the Section 2.3 the Hearing Committee did find that because of Adamian's position as a professor his continued presence in the group of demonstrators after the University President had asked them to quiet down was a violation of the code section which admonishes professors "to show respect to the opinions of others."

It is here noted that no other admonition contained in Section 3 ("When he speaks or writes as a citizen," he is admonished by the Code (1) to "strive to be accurate," (2) to "exercise appropriate restraint" and (3) "to make every effort to indicate that he is not a spokesman for the University") was found to be violated.

Although nothing in the charges indicated that termination of employment was being sought, the Committee concluded unanimously that Adamian's activities were not cause for termination and that a letter of censure should issue by reason of his failure "to show respect for the opinions of others."

The Board of Regents, without further hearing, objected to the Committee's findings and sent it back to them with instructions to reconsider the matter in the light of the Regents' objections.

The Committee reconsidered as directed and returned additional findings which indicated that the Regents' objections were in many respects based upon testimony which was taken out of context by the Regents and which were based on evidence and assumptions which were not established at the trial. The Committee unanimously reaffirmed its prior findings.

Thereafter the Regents held their own hearing on the matter. The transcript of the trial was reviewed, the two Regents who were present at the scene presented their "remarks during this (Regent's) meeting concerning what they observed at the Governor's Day ceremony," and counsel for the Regents was present during the proceedings. (Reporter's Transcript, 5-24-76 hearing, p. 17)

Adamian was not permitted to be present at the Regents' hearing. Adamian's counsel was not permitted to be present at the Regents' hearing. No opportunity to cross examine the Regents concerning their testimony on "what they observed at the Governor's Day ceremony" was given, and no opportunity was given to object to the composition of this new hearing tribunal of Regents (among whose members sitting in judgment) were two who were not only

percipient witnesses but who presented their observations to the tribunal either as witnesses or as deliberative argument or both.

Not unexpectedly, the Regents found Adamian guilty. No findings were made that he failed "to show respect for others" whilst he "speaks or writes as a citizen" or that he violated any of the remaining admonitory phrases enumerated above. It was simply decided "that, adequate cause existing, his employment as a member of the Faculty of the University of Nevada, Reno is terminated this date."

On July 23, 1971, Adamian filed an action in the United States District Court for the District of Nevada alleging violation of constitutional protections afforded by the Fourteenth and First Amendments to the United States Constitution.

Adamian moved for partial summary judgment. On April 16, 1973, a memorandum decision was entered by the District Court wherein it was declared that Chapter 4, Section 2.3 of the University Code, which was relied on to justify termination, was unconstitutional on its face because of overbreadth and vagueness. On July 20, 1973 summary judgment was entered directing immediate reinstatement of Adamian with back pay. (Appendix C)

Respondents filed their notice of appeal on August 30, 1973, after the appeal time had expired, claiming that a 54(b) order filed on the same day, which restated the July 20, 1973 order, started the appeal time running all over again. The Ninth Circuit agrees with this position. Restated August 30, 1973 Order is appended as Appendix D.

On September 24, 1975, the Court of Appeals for the Ninth Circuit reversed summary judgment and remanded with instructions "to hear testimony from the regents in order to determine whether the regents' construction of Section 2.3 is the same as that of the American Association of University Professors." (Appendix E)

In this decision, no mention was made of any issue other than propriety of summary judgment for facial invalidity, the Court's reasoning apparently being that if the regents who found Adamian guilty had at some time read AAUP Advisory Letter No. 11, issued in 1963, and their "construction of Section 2.3 is the same as" the AAUP newsletter, then, somehow, the concedely vague and overbroad section is validated. The newsletter was not before the District Court, is not in the Record on Appeal, and no one quite knows how it got into the Circuit Court's opinion of September 24, 1975.

On remand each regent was asked if his "construction of the University Code" was the same as that appearing in the 1963 letter. Each said: "Yes."

The irony of the remand charade is highlighted by the candid admission of one regent that he had not seen the AAUP letter until the day before the remand hearing.

Presentation of this statement is hampered by undersigned counsel's inability to understand what the "construction" of an AAUP letter by individual regents has to do with a vague statute whether construction is at the time of enactment, the *in abstentia* regents' trial of Adamian or at the time of the remand hearing. In Nevada such code provisions have the effect of law. *Richardson v. Board of*

Regents, 70 Nev. 144, 261 P.2d 515 (1953). The only agency which has authority for a "construction" of the law in Nevada is the Supreme Court of the State of Nevada. Even if such were not the case, there is still no "construction" by the Board of Regents as related to the AAUP or in any other manner; and most certainly the after-the-fact construction by the individual regents' statements at the remand hearing did nothing to provide "fair notice" to Adamian during his trials in 1970 before the Hearing Committee or before the Board of Regents.

Even if the AAUP letter theory is accepted as curing overbreadth and vagueness, such construction by the terms of the AAUP letter precludes its being an accusatory basis for termination for the following reasons:

1. The "construction" given by the AAUP letter relates only to the admonition relating to "appropriate restraint." The only finding at either Adamian trial was that he did not "show respect for the opinions of others," never that he failed to exercise "appropriate restraint." See *Adamian v. Jacobsen,* 523 F.2d 929; Appendix E, in which the letter is quoted thus:

> "It is the view of this Office that the term 'appropriate restraint' as used above refers solely to choice of language and to other aspects of the manner in which a statement is made."

The quotation further elaborates on the construction of "appropriate restraint" and does not even mention "respect for the opinions of others" or any of the other admonitions.

2. A construction of "appropriate restraint" cannot help much in the case of a person who has not been found guilty at any time by any agency (Hearing Committee, Regents or the Courts below) of failure to exercise appropriate restraint "when he speaks or writes as a citizen."

3. The AAUP letter permits "academic consideration" of such failures to exercise appropriate restraint "only when remarks raise 'grave doubts' concerning his fitness for his position." (Quoted again from *Adamian v. Jacobsen,* above.) Not only has there been no finding of failure to exercise appropriate restraint; even if there had been, no tribunal, judicial or administrative agency has suggested establishment of the required criterion of the AAUP, "grave doubts concerning his fitness for his position."

4. The AAUP letter "cautions" that "disciplining of a faculty member for exercising the rights of free speech guaranteed to him by the Constitution of the United States" should be taken "only under extraordinary circumstances." If the inapplicable AAUP document were applied, it in itself precludes termination under the facts presented in this case. In a footnote in *Adamian v. Jacobsen,* above cited, it is acknowledged:

> "(T)he Association emphasizes that such a lack of restraint does not *per se* justify dismissal, but only when it raises 'grave doubts' concerning the professor's fitness for his position."

"In May, 1976, the district court proceeded to take testimony on the question whether the Regents' interpretation of Chapter 4, Section 2.3 of the University Code was the same as that of AAUP. Seven of the Regents

testified that their construction was the same as that given by the AAUP. The district court *thereupon* found that to be the fact and, *consequently,* that Section 2.3 is not unconstitutionally overbroad." Adamian v. Lombardi, 608 F2d 1224, Ninth Circuit, October, 1979; Appendix H. (Emphasis supplied.)

The quoted section makes it very clear that all that was deemed necessary to cure the facial invalidity was the testimony of seven regents that "their construction was the same as that given by AAUP." This is very difficult to comprehend.

In addition to holding the questioned statute constitutionally unobjectionable, *Adamian v. Lombardi* (1979) held that Adamian could not be protected by the First Amendment when he was guilty of "intentionally disruptive acts," something he was never accused of. Part of the problem here is that the facts stated in the Opinion in Lombardi are taken entirely from the findings resulting from the Regents' *in absentia* trial, in which he is found guilty of improperly stopping the motorcade, leading demonstrators, making loud noises, "creating a danger of violent confrontations" and various other culpable activities of which he was acquitted in the admittedly proper, due process trial held by the Hearing Committee.

If Section 2.3 is facially constitutionally valid; and if the Regents can properly hold a trial in which plaintiff and his attorney are not allowed to be present and cross examine and confront witnesses; and if the Regents may judge credibility of witnesses and make findings on witnesses' testimony (including testimony of Regents themselves) which are contradictory to findings resulting from

the due process trial held by the Hearing Committee; and if Adamian can be terminated without a finding that he failed to "exercise appropriate restraint" and that such failures created grave doubts concerning his fitness for his position; then we must consider that his dismissal is proper.

There is just as much reason for the court below to borrow an American Civil Liberties Union pamphlet as an AAUP letter. In the pamphlet "Academic Due Process" it is provided:

> "9. In the absence of a defect in procedure, the conclusions of the hearing committee should be taken as final by the administration and governing board in all matters relating to the teacher's competence and integrity." (Appellant's Reply Brief, p. 11, Adamian v. Lombardi).

The cumulative unfairness, the gross injustice and the terrifying abuse of free speech in this case is epitomized and summarized by the sworn testimony of Regent Lombardi that the Regents' actions in retrying Adamian were "motivated by a desire to punish" him and thereby "to discourage further war protests at the University of Nevada." (Transcript of May 24, 1976 Hearing, pp. 16 and 17) This atrocity has never been commented upon by the district court, the court of appeals or even opposing counsel.

Other than what Adamian contends to be an erroneous finding of constitutional validity of the statute and a completely unjustifiable finding of "intentionally disruptive acts," the court below has addressed none of the issues raised by Adamian and has, in fact, repudiated the necessity of considering them. In Adamian v. Lombardi, the

court expressly excluded all other issues stating that "the scope of review is narrowed to the limitations of the remand," i. e. "whether the Regents' construction of Section 2.3 is the same as that of the American Association of University Professors." This leaves entirely untended to the crucial, critical and dispositive issues of substantive and procedural due process. (Without any sign of having considered the issues the court in Lombardi does "hold that Professor Adamian was not denied freedom of speech, nor of assembly, nor equal protection." Not listing denial of due process among these is convincing evidence of our assertion that Adamian's claim of denial of due process has never been considered at the trial of appellate level.

A great injustice is being done here.

Petitioners filed a petition for rehearing. The court denied the petition on December 18, 1979.

REASONS FOR GRANTING THE WRIT

1. Petitioner had been denied his right of appeal, and his right of recourse to the courts. Law of the case doctrine

Petitioner was dismissed as a tenured professor as a result of a trial held by the University of Nevada Board of Regents in his absence. He complains to all that due process rights were denied because he was not allowed to be present, was not allowed to confront witness-Regent Anderson and witness-Regent Hug, because although counsel for the university was present he was denied representation of counsel at the Regents' trial, because he was denied an impartial tribunal by reason of members of the Board of Regents' holding a position adverse to his, mak-

ing statements in his absence to the Regents at the Regents' trial, because the Regents did not have the power under any circumstances to judge the credibility of witnesses and make other findings and judgments on the evidence contrary to and contradictory to the Hearing Committee's findings; because even had the Regents restricted their proceedings to a review of the Hearing Committee's transcript, they had no power to "reverse" it, especially in light of the prejudicial composition of the board; and because Regent Lombardi's statement that the Regents were motivated by a desire to discourage protest and block the exercise of free speech rights infects the entire proceedings with prejudice, unfairness and denial of due process.

None of these claims has been heard. None of these claims has been commented upon by any court. None of the issues raised by these claims has been judicially determined. Petitioner has been denied his right to recourse to the courts to resolve differences if the record is allowed to stand in its present state. See *Nucor Corp. v. Tennessee Forging Steel Service, Inc.,* 513 F.2d 151, 153 (8th Cir. 1975); *Electrical Research Products v. Gross,* 120 F.2d 301, 308 (9th Cir. 1941).

2. Court of Appeals ruling on facial invalidity is patently erroneous and should not be allowed to stand as the law of the Circuit

The Court of Appeals' ruling that a statute ruled to be facially vague and overbroad is constitutionally valid if members of the governing board of a university testified that their construction was the same as an AAUP letter is patently erroneous and cognizance should be taken at

the level of the Supreme Court. This is especially true in light of the following circumstances:

2.1. *No authoritative construction.* In the *Jacobsen* case, the court held that the facial validity of Section 2.3 is to be determined not only by the language of the statute but also by reference to the "authoritative construction" given "by the state agency which issues and enforces it." The court cited *Jablon v. Trustees of California State Colleges,* 482 F.2d 997 (9th Cir. 1973) which does involve a constitutional attack on grievance procedures in a college (on issues of due process), but reference to interpretation by the governing board is used only to determine whether the board has complied with its regulations.

Citing *Jablon* is "stretching" things a bit, and we find no cases in which a First Amendment challenge was met by a court's reliance on an agency interpretation. *Richardson v. Board of Regents*, cited above, is authority for the proposition that the Code provision has the effect of law; therefore the only authoritative construction can be and must be a judicial one. Since this important issue remains undecided, it is worthy for consideration and decision by the Supreme Court.

2.2. The Board of Regents' construction of § 2.3 came years after Adamian had failed to exercise appropriate restraint, or whatever. Even assuming that the eventual construction was sufficiently narrow, it cannot properly be applied to Adamian as he did not have a "fair warning" of this construction. There is no clear answer to this question as the Court's language is contradictory and confusing.

The latest example of the confusion surrounding this issue is seen in *Broadrick v. Oklahoma*, 413 U.S. 601, 613

(1973) where, in a single paragraph the Court appears to have indicated contrary positions:

> "The consequence of our departure from traditional rules of standing in the First Amendment area is that *any enforcement of a statute thus placed at issue is totally forbidden until and unless a limiting construction or partial invalidation so narrows it* as to remove the seeming threat or deterrence to constitutionally protected expression. Application of the overbreadth doctrine in this matter is, manifestly, strong medicine. It has been employed by the Court sparingly and only as a last resort. *Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute.*" (Emphasis added).

The Court's puzzling assumption that the defendant possesses prescience is undermined by a number of other Court opinions. For example, *Lanzetta v. New Jersey*, 306 U. S. 451 (1939), involved a challenge of a recently enacted "gang" statute. Following the defendant's conviction, but prior to the Supreme Court's opinion, the state court interpreted the statute in *State v. Gaynor*. The Court did not find the interpretation to be sufficiently narrow but noted that even if it were sufficiently narrow, appellants were convicted before the opinion in *State v. Gaynor*. It would be hard to hold that, in advance of judicial utterance upon the subject, they were bound to understand the challenged provision according to the language later used by the court. *Id.* at 456.

In *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), the Court upheld the constitutionality of a "fighting words" statute. But as the Court noted in *Gooding v. Wilson*, 405 U. S. 518 (1972), (in an analysis of Chaplinsky):

> The Supreme Court of New Hampshire however, *long before* the words [were spoken] sharply limited the statutory language . . . to "fighting words." *Id.* at 522-23 (Emphasis added).

It appears reasonable for Petitioner to ask the Supreme Court to express its opinion on the issues of the appropriateness of the construction of the administrative agency and the manner and time in which the construction was made.

3. *Expiration of Appeal Time.* The procedural and jurisdictional issue of whether an appeal time can be revitalized by a court's filing a "restated" summary judgment should be determined by the Supreme Court in the interest of Circuit uniformity.

4. *An Injustice.* There is a terrible injustice in this case that is apparent to almost anyone who reviews its incidents. All other considerations aside, it is right and proper that it be reviewed by the Supreme Court.

CONCLUSION

For reasons stated, a writ of certiorari should issue to review this judgment and opinion of the Court of Appeals for the Ninth Circuit.

Dated: This 10th day of March, 1980.

Charles E. Springer
Attorney for Petitioner

(Appendices follow)

Appendices

Appendix A

In the United States District Court
for the District of Nevada

Paul S. Adamian, Plaintiff, vs. The University of Nevada, the Board of Regents of the University of Nevada, Dr. Louis E. Lombardi, Fred M. Anderson, Procter E. Hug, William W. Morris, Helen R. Thompson, James H. Bilbray, Archie C. Grant, Paul McDermott, Harold J. Jacobsen, Mel Steninger, Molly Knudtsen, and John Does I, II, III, IV, V, VI, VII and VIII, Defendants.	Civil R-2530

MEMORANDUM OPINION

[Apr 17 1973]

The plaintiff, a tenured professor of English of the University of Nevada, was discharged by action of the University's Board of Regents for attempting to stop a motorcade and for attempting to disrupt ceremonies of the Governor's review of ROTC activities, which ceremonies were conducted on the Reno campus of the University.

Plaintiff, alleging that jurisdiction exists under the Civi Rights Act, Title 28, U.S.C., § 1343, and Title 42, U.S.C.,

§ 1983, brought this action against the University of Nevada, the Board of Regents of the University of Nevada, Dr. Louis E. Lombardi, Fred M. Anderson, Procter E. Hug, William W. Morris, Helen R. Thompson, James H. Bilbray, Archie C. Grant, Paul McDermott, Harold J. Jacobsen, Mel Steninger, Molly Knudtsen, and John Does I through VIII.

A.

Parties Defendant

On December 23, 1971, Judge Philip C. Wilkins dismissed the action as to the University of Nevada and the defendant Board of Regents because these state agencies are not a "person" within the meaning of the Civil Rights Act, 42 U.S.C. 1983. *Whitner v. Davis,* 410 F.2d 24 (9th Cir. 1969). Judge Wilkins also dismissed the John Doe defendants. The Regents are being sued, both individually and in their representative capacities. Plaintiff seeks from this Court an order directing that plaintiff be reinstated with back pay and an award of damages for the violation of his civil rights. The Court is being asked to:

1. Order the members of the Board of Regents *now in office,* in their *representative* capacities, to reinstate the plaintiff and compensate him for loss of earnings.

2. Award the plaintiff damages for the violation of his civil rights against those Regents, in their *individual* capacities, *then in office,* responsible for his discharge.

Although the Board of Regents as a state agency is not a "person" within the Civil Rights Act, the Regents themselves are "persons" and can be sued both as individuals and in their representative capacities. The rule is explained

in *Harkless v. Sweeny Independent School District,* 427 F.2d 319 (5th Cir. 1970), cert. den. 400 U.S. 991, where the Court said:

> "Turning then to the officials, the trustees and the superintendent, it seems well settled that § 1983 authorizes a suit against them. Federal judicial power has long been invoked to compel state officials to discharge their constitutional duties. • • •
>
> "In numerous cases since Monroe v. Pape, the Supreme Court has permitted relief under § 1983 against state officials sued as such, without mention of that case. • • •
>
> "We find no prohibition in Monroe v. Pape against the exercise of federal judicial power through § 1983 to redress constitutional wrongs through requiring appropriate official acts by officials sued in their representative capacities. We therefore conclude that § 1983 includes school district trustees and school superintendents, acting in their representative as well as their individual capacities, within the meaning of 'person' as the term is used in § 1983 for the purposes of the equitable relief sought here."

The Ninth Circuit lays down the same rule. In *Whitner v. Davis,* 410 F.2d 24 (9th Cir. 1969), at pages 30 the Court said:

> "Individuals, sued in their capacity as trustees of a state agency, are not protected by the Eleventh Amendment any more than the agency itself is protected by that Amendment. Moreover, the allegations and prayer of plaintiff's complaint make it clear that this is not intended to be exclusively a suit against the State of Washington. Plaintiff seeks monetary damages and unspecified equitable relief against the personal de-

fendants as individuals as well as in their capacities as president and trustees of the college or Attorney General of the state."

The rule is also followed in *Williams v. Eaton,* 443 F.2d 772 (10th Cir. 1971), and *Hayes v. Cape Henlopen School District,* 341 F.Supp. 823 (D.C. Del. 1972). It is not necessary for the plaintiff to amend the complaint to include the present members of the Board of Regents who are being sued in their representative capacities. The present Regents are already properly before this Court because the plaintiff has sued all of the Regents in their representative capacities. This is accomplished by FRCivP 25(d)(1) which states in pertinent part:

"When a public officer is a party to an action in his official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded."

The applicability of Rule 25(d)(1) to the instant case is explained in the Advisory Committee's Note of 1961 to Subdivision (d) found in 3B Moore's Federal Practice, Section 25.01(13):

"Thus the amended rule will apply to actions against officers to compel performance of official duties or to obtain judicial review of their orders. It will also apply to actions to prevent officers from . . . enforcing unconstitutional enactments. . . . Excluded from the operation of the amended rule will be the relatively infrequent actions which are directed to securing money judgments against the named officers enforceable against their personal assets . . ."

Therefore, the Regents being sued in their representative capacities are those Regents *who presently are members* of the Board of Regents. Those Regents who are being sued in their individual capacities are those Regents *who were members* of the Board of Regents at the time of plaintiff's dismissal.

B.

Overbreadth and Vagueness

The plaintiff has moved for partial summary judgment on the claim against the Regents in their representative capacities seeking reinstatement and back pay. The plaintiff argues that the University regulation upon which the Regents relied to terminate the plaintiff is unconstitutionally vague in violation of due process under the Fourteenth Amendment. Plaintiff further claims that because the regulation is unconstitutionally overbroad, as well as vague, it infringes upon his rights of free speech and assembly protected by the First Amendment, which by the Fourteenth Amendment is made applicable to the states.

The section of the University Code upon which the defendants based their determination to terminate the employment of the plaintiff was Chapter IV, Section 2.3, which reads as follows:

"The faculty member is a citizen, a member of a learned profession, and a representative of this University. When he speaks or writes as a citizen, he will be free from University censorship or discipline, but

> his special position in the community imposes special obligations. As a man of learning and as an educator, he knows that the public may judge his profession and this University by his utterances. At all times he strives to be accurate, to exercise appropriate restraint, to show respect for the opinions of others, and to make every effort to indicate that he is not a spokesman for this University."

The defendants admit that the University Code is given the effect of law in the State of Nevada. In *State v. Board of Regents,* 70 Nev. 144 (1953), the Nevada Supreme Court held:

> "In our opinion this rule (university tenure regulations), having been duly established, has the force and effect of statute."

Therefore, in deciding the constitutionality of Section 2.3, the Court will not be concerned with the question whether disciplinary rules must meet the same vagueness and overbreadth criteria as statutes and ordinances. The instant case is distinguishable from cases like *Sword v. Fox,* 446 F.2d 1091 (4th Cir. 1971), which holds that the same specificity of language is not required for college disciplinary rules as is required for statutes. In the instant case, the section of the University Code under scrutiny has the effect of a statute.

For this challenge to the substantive constitutionality of the University Code section, whether or not the plaintiff received procedural due process and whether or not the plaintiff's conduct could conceivably be said to be proscribed by Section 2.3, is irrelevant. Although this Court does not reach the question, if it be assumed that the plaintiff's conduct was not constitutionally protected and

such conduct could be prohibited by a properly drawn regulation, the plaintiff can nonetheless challenge the substantive constitutionality of the section under which he was terminated. As the Court stated in *Soglin v. Kauffman,* 418 F.2d 163 (7th Cir. 1969):

> "Likewise, the nature of the conduct attributed to plaintiffs has no effect on their standing to challenge the application of the misconduct doctrine as the basis for the proceedings taken against them. They are entitled to contend that the disciplinary proceedings were invalid deprivations of due process because based upon nonexistent or unconstitutionally vague standards. It is well settled that a statute threatening the exercise of freedoms because of overbreadth is subject to attack.
>
> '* * * with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity. Thornhill v. Alabama, 310 U. S. 88, 97-98, 60 S. Ct. 736, 741-742, 84 L. Ed. 1093; NAACP v. Button, 371 U. S. [415], at 432-433, 83 S. Ct. at 337-338, 9 L. Ed. 2d 405; cf. Aptheker v. Secretary of State, 378 U. S. 500, 515-517, 84 S. Ct. 1659, 1668-1669, 12 L. Ed. 2d 992; United States v. Raines, 362 U.S. 17, 21-22, 80 S. Ct. 519, 522-523, 4 L. Ed. 2d 524. We have fashioned this exception to the usual rules governing standing, see United States v. Raines, supra, because of the "* * * danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application". NAACP v. Button, supra, 371 U. S. at 433, 83 S. Ct. at 338.'" Dombrowski v. Pfister, 380 U. S. 479, 486-487, 85 S. Ct. 1116, 1121, 14 L. Ed. 3d 22.

The rule is also explained by the Supreme Court in *Coates v. City of Cincinnati,* 402 U.S. 611 (1970):

> "The ordinance before us makes a crime out of what under the Constitution cannot be a crime. It is aimed directly at activity protected by the Constitution. We need not lament that we do not have before us the details of the conduct found to be annoying. It is the ordinance on its face that sets the standard of conduct and warns against transgression. The details of the offense could no more serve to validate this ordinance than could the details of an offense charged under an ordinance suspending unconditionally the right of assembly and free speech."

Therefore, the plaintiff's conduct, as well as the procedures followed by the Regents, is irrelevant with regard to this constitutional challenge.

The plaintiff argues that the section is constitutionally infirm because of its vagueness, i.e., it violates the due process clause of the Fourteenth Amendment. In the alternative, since freedom of speech and assembly are involved, the plaintiff argues that the section violates the First Amendment as embodied in the Fourteenth by reason of its vagueness and overbreadth. When the First Amendment is involved in the scrutiny, the standard becomes more exacting.

The "vagueness" test under the due process clause of the Fourteenth Amendment is explained in *Connally v. General Construction Co.,* 269 U.S. 385 (1926):

> "A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."

This has remained the standard of vagueness down through the years. In the instant case, men of common intelligence would certainly be confused about the conduct allowed or proscribed in the section in question.

When the First Amendment element is added, the unconstitutionality becomes certain. The District Court, in *Soglin v. Kauffman,* 295 F. Supp. 978 (W.D. Wis. 1968), aff. 418 F. 2d 163, lucidly explained the additional scrutiny required when First Amendment freedoms were involved:

> "Moreover, the vagueness doctrine is not to be conceived as being limited solely to the concept of fair notice as an element of substantive due process. The vagueness doctrine embodies a First Amendment concept as well:
>
> 'The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application.' NAACP v. Button, 371 U. S. 415, 432-433, 83 S. Ct. 328, 338, 9 L. Ed. 2d 405 (1963).
>
> 'Vague laws in any area suffer a constitutional infirmity. When First Amendment rights are involved, we look even more closely lest, under the guise of regulating conduct that is reachable by the police power, freedom of speech or of the press suffer.' Ashton v. Kentucky, 384 U. S. 195, 200, 86 S. Ct. 1407, 16 L. Ed. 2d 469 (1966).
>
> "Whether a given rule 'involved' First Amendment rights so as to require that it be looked to 'more closely' is often relatively easy to determine: a rule against bank robbery does not; a rule regulating public gatherings probably does. A rule against 'miscon-

duct' is so grossly vague that possible involvement of First Amendment rights cannot be ignored. It is not permissible to 'presume that the statute curtails constitutionally protected activity as little as possible.' NAACP v. Button, supra, 371 U. S. at 432, 83 S. Ct. at 337."

The regulation pursuant to which the plaintiff was terminated is so overbroad that it could authorize a tenured professor's termination for utterances which were inaccurate, a situation held constitutionally impermissible by *Pickering v. Board of Education,* 391 U. S. 563 (1968). The wide range of constitutionally protected activities which could be infringed by this regulation seems unlimited. The inadequacy of the regulation is apparent on its face. The regulation is so vague that men of common intelligence could differ as to its meaning and some of the apparently proscribed conduct is conduct which is constitutionally permissible. The combination of the vagueness and the overbreadth make the section invalid on its face. The section violates the due process clause of the Fourteenth Amendment by reason of its vagueness and violates the First Amendment as embodied in the Fourteenth Amendment by reason of its vagueness and overbreadth.

The Court makes no finding as to the conduct of the plaintiff which resulted in the plaintiff's termination. Under a properly drawn regulation that gives full protection to a professor's constitutional rights, the plaintiff may well have been properly discharged. The Court does not reach the issue of whether the plaintiff's conduct was constitutionally protected because, regardless of what the plaintiff did, he could not be dismissed under the unconstitutional regulation. The Court finds only that the plaintiff was terminated

by the Board of Regents for allegedly violating Chapter IV, Section 2.3, of the University Code. Because the section upon which the Regents relied is substantively unconstitutional, the Regents cannot rely on it and the plaintiff must be reinstated and compensated for loss of earnings.

It is clear that this Court has the power under 42 U.S.C. 1983 to order the reinstatement of the professor. Such reinstatement relief will be granted the plaintiff in his suit against the Regents in their representative capacities. *Harkless v. Sweeny Independent School District,* supra; *Hayes v. Cape Henlopen School District,* supra; *Ramsey v. Hopkins,* 447 F. 2d 128 (5th Cir. 1971). Can the Court, consistently with the Eleventh Amendment, order the Regents, being sued in their representative capacities, to pay the plaintiff back pay? The Court, in *Harkless,* supra, explained it this way:

> "Section 1983 was designed to provide a comprehensive remedy for the deprivation of federal constitutional and statutory rights. The prayer for back pay is not a claim for damages, but is an integral part of the equitable remedy of injunctive reinstatement. Reinstatement involves a return of the plaintiffs to the positions they held before the alleged unconstitutional failure to renew their contracts. An inextricable part of the restoration to prior status is the payment of back wages properly owing to the plaintiffs, diminished by their earnings, if any, in the interim. Back pay is merely an element of the equitable remedy of reinstatement." (Citations omitted.)

Therefore, the back pay is not a judgment for damages running against the state via the Regents in their representative capacities, but is, rather, part of the equitable relief this Court can order. Other cases recognize back

pay as an integral part of the equitable remedy of reinstatement. *Jinks v. Mays,* 464 F.2d 1223 (5th Cir. 1972); *McFerren v. County Bd. of Ed. of Fayette Co., Tenn.,* 455 F.2d 199 (6th Cir. 1972); *Horton v. Lawrence County Bd. of Education,* 449 F. 2d 793 (5th Cir. 1971); *Smith v. Hampton Training School for Nurses,* 360 F. 2d 577 (4th Cir. 1966); *Schreiber v. Joint School Dist. No. 1, Gibraltar, Wis.,* 335 F. Supp. 745 (E.D. Wis. 1972). The amount of back pay would be the wages owing from the date of dismissal to the present date of reinstatement diminished by the plaintiff's earnings, if any, during the period of his dismissal. *Ramsey v. Hopkins,* supra, and *Harkless v. Sweeny Independent School Dist.,* supra.

Plaintiff's motion for partial summary judgment is granted.

C.

Qualified Governmental Immunity

The defendants argue in support of their motion for summary judgment that they acted in good faith when they voted to terminate the plaintiff's employment contract and therefore are within the defense of qualified governmental immunity. At the outset, it must be emphasized that any qualified immunity would shield the Regents only in their individual capacities. The immunity would prevent an award of damages against the individual Regents, but the immunity does not shield the Regents being sued in their representative capacities from equitable relief. In *Roth v. Board of Regents of State Colleges,* 310 F. Supp. 972 (W.D. Wis. 1970), the Court said:

> "The purpose of common law immunity enjoyed by the judiciary and legislature, here sought to be extended in a qualified form to the defendant Board and university president, is to preserve the integrity and independence of those bodies, and to insure that judges and legislators will act on their free, unbiased convictions, uninfluenced by apprehensions of consequences . . . Such considerations do not support extending, nor have courts extended, the doctrine to shield officials from the type of equitable relief here requested [reinstatement of professor]."

The most cogent explanation of the qualified governmental immunity which would shield the defendants from personal liability for their good faith acts is found in *Bennett v. Gravelle,* 323 F. Supp. 1031 (D.C. Md. 1971), where the Court says, at page 212:

> "The Supreme Court has not definitively spoken on the applicability of the doctrine of governmental immunity in actions brought under section 1983 against local governmental agency officials, such as the defendants in this case. Nevertheless, while such officials may not be entitled to the absolute immunity which has been accorded to all legislators and judges, they are still entitled to a limited or a qualified immunity. This interpretation is in accordance with the general intent and tenor of the Act. As was stated in Jobson v. Henne, 355 F. 2d 129, 133 (2d Cir. 1966), 'to hold all state officers immune from suit would very largely frustrate the salutary purpose of this provision.' But to take away all immunity would seem to give the section a meaning that Congress did not intend. See Hoffman v. Halden, 268 F. 2d 280, 300 (9th Cir. 1959). In Cobb, supra [Cobb v. City of Malden, 202 F. 2d 701 (1st Cir. 1953)], the Court stated:
>
> a roughly accurate generalization that members of a city council, and other public officers not in the

exceptional category of officers having complete immunity, would have a qualified privilege, gives them a defense against civil liability, for harms caused by acts done by them in good faith in performance of their official duty as they understood it. Id., 202 F. 2d at 707.

"The Court in Pierson [Pierson v. Ray, 386 U. S. 547, 554, 87 S. Ct. 1213, 1218, 18 L. Ed. 2d 288 (1967)], in addition to reaffirming the common law immunity of judges, specifically held that the defense of *good faith* and *probable cause* was available in an action under section 1983 to police officers who had arrested the petitioners, acting under a statute which was subsequently held to be unconstitutional but which the officers had probable cause to believe was valid, 386 U. S. at 555-557, 87 S. Ct. 1213. The Court thus made it clear that state officers, although not entitled to an absolute and unqualified immunity, have at least a limited immunity for acts done by them in good faith within the scope of their official duties. Good faith and probable cause are defenses not because of any language in section 1983, but because section 1983 must be read in a manner consistent with the background of common law immunities.

"In Cobb, Judge Magruder stated that 'the Act merely expresses a prima facie liability, leaving to the courts to work out, from case to case, the defenses by way of official privilege which might be appropriate to the particular case.' 202 F. 2d at 706. In Francis v. Lyman, the learned judge said that 'we think it no longer appropriate' to 'give effect to the statute in its literal wording.' 216 F. 2d 583, 587 (1st Cir. 1954); instead, it is the duty of the court to 'fit the statute as harmoniously as may be into the familiar and generally accepted legal background, and to confine its

application, within reason, to those situations which might possibly have had the approval of the Congress if it had specifically adverted to the particular cases, bearing in mind the basic purposes which gave rise to the legislation in the first place.' Id. at 587." (Emphasis supplied.)

This qualified immunity has been phrased differently in many courts. In *Hayes v. Cape Henlopen School Dist.*, 341 F. Supp. 823 (D.C. Del. 1972), the Court said, at page 829:

> "As public officials exercising discretion while performing their duties, the individual defendants possess a qualified privilege precluding liability for the performance of official responsibilities if undertaken in good faith."

In *McLaughlin v. Tilendis,* 398 F. 2d 287 (7th Cir. 1968), a probationary teacher brought a civil rights action to gain reinstatement after dismissal allegedly solely because of union membership. The Court explained the limited application of the qualified immunity:

> "To hold defendants absolutely immune from this type of suit would frustrate the very purpose of Section 1983 . . . At best, defendants' qualified immunity in this case means that they can prevail only if they can show that plaintiffs were discharged on justifiable grounds. Thus here a successful defense on the merits merges with a successful defense under the qualified immunity doctrine."

The Ninth Circuit approach seems to deal with good faith and whether the officials' acts were discretionary. In *Hoffman v. Halden,* 268 F. 2d 280 (9th Cir. 1959), the Court of Appeals held:

> ". . . we are content to . . . extend immunity to a state officer for his discretionary acts within the scope of his authority."

In adopting the "immunity for discretionary acts" approach, the Ninth Circuit relied on several common law immunity cases which were not Civil Rights cases. It is important to note that in *Hoffman* the Court said:

> "This approach says we will not inquire, subjectively —into their state of mind—where they are exercising a discretionary function."

If the rule of the Ninth Circuit is simply one of immunity for discretionary acts, this Court would merely have to decide whether the firing of the plaintiff was a discretionary act within the scope of the Regents' authority. It would seem that under this approach the good faith of the Regents would be irrelevant, and the Court could grant summary judgment for the Regents in the suit against them in their individual capacities if the Court found their actions to be discretionary within the scope of their authority. The immunity for discretionary acts approach was followed in *Silver v. Dickson,* 403 F. 2d 642 (9th Cir. 1968), and as recently as 1971 in *Boreta v. Kirby,* 328 F. Supp. 670 (N.D. Cal. 1971), where the Court said:

> "The determination of whether defendant Figoni [Investigator for the California Department of Beverage Control] can claim governmental immunity is dependent upon whether his alleged actions can be considered *discretionary acts* and whether they were done within the *scope of his authority.*" (Emphasis supplied.)

There was no mention of a good faith defense in either case.

The Ninth Circuit case which adopted the immunity for discretionary acts approach for Civil Rights cases, *Hoffman,* was decided eight years before the Supreme Court addressed the issue in *Pierson v. Ray,* 386 U. S. 547, 554, 87 S. Ct. 1213, 1218, 18 L. Ed. 2d 288 (1967). The Supreme Court in *Pierson* made it clear that state officers, although not entitled to an absolute and unqualified immunity, have at least a limited immunity for acts done by them in good faith within the scope of their official duties. In *Silver* and *Boreta,* which adopted the test of *Hoffman,* the courts do not discuss *Pierson,* which antedated them. Every circuit, except possibly the Ninth, has adopted the good faith test for qualified governmental immunity. If the good faith test, rather than the immunity for discretionary acts test, is followed, this Court cannot grant summary judgment to the Regents in the suit against them in their individual capacities because of the factual issue of good faith and malice. As was stated in *Endicott v. Van Petten,* 330 F. Supp. 878 (D.C. Kan. 1971):

> "Since the immunity issue depends upon the determination of whether the defendants acted in good faith, it must await factual determination at a later date, in the face of a specifically plead allegation that defendants' actions were willful and malicious, obviously excluding a good faith basis."

One Ninth Circuit case has recognized the apparent impropriety of the immunity for discretionary acts test following the *Pierson* decision. In *Donovan v. Reinbold,* 433 F. 2d 738 (9th Cir. 1970), the Court said:

"Their alternative contention is that state officials are immune from liability for discretionary acts done within the scope of their authority. Silver v. Dickson (9th Cir. 1968) 403 F. 2d 642 and Hoffman v. Halden (9th Cir. 1959) 268 F. 2d 280 cautiously extend immunity to some state officials performing some kinds of discretionary acts. Thus in Silver, immunity was extended to members of a state parole board in the performance of their discretionary duties in denying parole. In Hoffman, immunity was recognized for a jailor or keeper who refused to release a prisoner held on warrant or commitment. Neither case stands for the broad principle that all public officials are immune from Civil Rights Act liability if their acts were discretionary and were done within the scope of their official duties."

Then follows a footnote which states:

"The Supreme Court has never adopted this doctrine. Aside from judicial and legislative immunity, the Court seems to offer public officers only the defense of 'good faith'. See Pierson v. Ray . . ."

The *Boreta* case, which came after *Donovan*, is a District Court case which applied the discretionary act test without even mentioning "good faith" or the *Pierson* and *Donovan* cases. Since *Donovan* is the most recent Ninth Circuit Court of Appeals case and it recognizes that the "Court seems to offer public officers only the defense of 'good faith' ", this Court believes it should not follow the Ninth Circuit cases of *Hoffman, Silver,* and *Boreta,* but apply in the instant case the "good faith" test for qualified governmental immunity, rather than the discretionary act test. It would appear that the discretionary act test

goes too far in emasculating the Civil Rights Act and is contrary to the Supreme Court in *Pierson.*

Therefore, this Court adopts the good faith test for qualified governmental immunity as most recent courts have, and therefore denies the Regents' motion for summary judgment as to their individual liability because of the unresolved genuine issue of material fact.

D.

Certain Regents Entitled to Summary Judgment

Defendants William W. Morris, Helen R. Thompson and Mel Steninger seek summary judgment in their favor on the grounds that they were not members of the Board of Regents when the plaintiff was terminated. Defendant James H. Bilbray seeks summary judgment in his favor on the grounds that although a member of the Board of Regents when the plaintiff was terminated, he voted against termination. Defendant Archie C. Grant seeks summary judgment in his favor on the grounds that although a member of the Board of Regents when the plaintiff was terminated, he was not present when the Board of Regents acted to terminate plaintiff. Each of the above said defendants is entitled to summary judgment in his favor, as to any possible individual liability to plaintiff. Those of the above said defendants that are now members of the Board of Regents shall remain defendants herein in their representative capacities only. Those who are no longer members of the Board of Regents are dismissed.

Plaintiff's counsel will prepare and submit to defendants' counsel for approval as to form and substance and lodge with the Clerk of the Court appropriate findings of fact, conclusions of law, and partial summary judgment within 20 days from the date of this order.

DATED: April 16, 1973.

ROGER D. FOLEY
District Judge

Appendix B

In the United States District Court
for the District of Nevada

Paul S. Adamian,

Plaintiff,

vs.

The University of Nevada, the Board of Regents of the University of Nevada, Dr. Louis E. Lombardi, Fred M. Anderson, Procter E. Hug, William M. Morris, Helen R. Thompson, James H. Bilbray, Archie C. Grant, Paul McDermott, Harold J. Jacobsen, Mel Steninger, Molly Knudtsen, and John Does I, II, III, IV, V, VI, VII and VIII.

Defendants.

Civil R-2530

[July 20, 8:32 A.M., 1973]

SUPPLEMENTAL OPINION, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND SUMMARY JUDGMENT

SUPPLEMENTAL OPINION

On April 16, 1973, this Court filed its memorandum opinion granting plaintiff's partial motion for summary judgment and denying defendants' motion for summary judgment.

On June 22, 1973, defendants filed a motion for rehearing on the denial of defendants' motion for summary judgment.

Plaintiff has failed to respond to defendants' motion for rehearing. Defendants state in part:

> "FRCP, Rule 56(e), as interpreted by the Ninth Circuit, does not permit the Plaintiff to rely merely upon his pleadings to show that a genuine issue of material fact exists regarding the issue of good faith when Defendants have filed sworn affidavits alleging good faith and Plaintiff has failed to file opposing affidavits. Therefore, the issue of good faith should be resolved in favor of Defendants."

The motion to reconsider is granted. This Court agrees with defendants' contentions set forth above. This Court now holds that defendants are entitled to summary judgment against plaintiff. In its memorandum opinion filed April 19, 1973, the Court overlooked the fact that the plaintiff had not complied with Rule 56(e), FRCP. This Court now holds that there are no genuine issues of material fact as to the good faith issue in view of defendants' affidavits and the failure of plaintiff to file opposing affidavits.

FINDINGS OF FACT

The Court finds the following facts to be admitted by the pleadings or established beyond dispute in the files and records of this action:

I.

The plaintiff PAUL S. ADAMIAN was discharged from his position as a tenured professor of English at the University of Nevada, Reno campus, by action of the University Board of Regents on December 12, 1970.

II.

The present members of the Board of Regents are Harold J. Jacobsen, Flora Dungan, Fred M. Anderson, M.D., James L. Buchanan II, Nedra Joyce, Louis E. Lombardi, M.D., William W. Morris, Mel Steninger and Helen R. Thompson.

III.

The defendants University of Nevada and the Board of Regents, as well as the defendants designated by John Doe fictitious names, have been previously dismissed from this action.

IV.

The defendants who were members of the Board of Regents on December 12, 1970, dismissed the plaintiff upon a determination that he had violated the provisions of Chapter IV, Section 2.3, of the University Code, which provides:

> "The faculty member is a citizen, a member of a learned profession, and a representative of this University. When he speaks or writes as a citizen, he will be free from University censorship or discipline, but his special position in the community imposes special obligations. As a man of learning and as an educator, he knows that the public may judge his profession and this University by his utterances. At all times, he strives to be accurate, to exercise appropriate restraint, to show respect for the opinions of others, and to make every effort to indicate that he is not a spokesman for this University."

V.

In determining that the plaintiff had violated Chapter IV, Section 2.3, of the University Code, the defendants who were then members of the Board of Regents determined that the plaintiff had attempted to stop a motorcade and attempted to disrupt ceremonies of the Governor's review of ROTC activities on the Reno campus of the University. The Court makes no findings as to whether such determination was correct, the facts relating thereto being in dispute between the parties.

VI.

There are no genuine issues of material fact as to the good faith of the persons who comprised the Board of Regents of the University of Nevada on December 12, 1970, in determining that the plaintiff should be discharged from his position as a tenured professor at such University.

CONCLUSIONS OF LAW

Based upon the foregoing facts and the applicable authorities, the Court makes the following conclusions of law:

I.

The Court has jurisdiction over this controversy pursuant to the provisions of Title 28 U.S.C. § 1343 and Title 42 U.S.C. § 1983.

II.

The defendants are sued in their capacity as representatives of the University of Nevada and in their individual capacities. By reason of the automatic substitution provisions of Rule 25(d)(1) of the Federal Rules of Civil

Procedure, the Regents being sued in their representative capacities are those Regents who presently are members of the Board of Regents, and the Regents being sued in their individual capacities are those Regents who were members of the Board of Regents at the time of plaintiff's dismissal.

III.

Chapter IV, Section 2.3, of the University Code of the University of Nevada has the same force and effect under the laws of the State of Nevada as does a statute, and is subject to the same criteria regarding overbreadth and vagueness required by the due process clause of the Fourteenth Amendment to the United States Constitution as are statutes.

IV.

Chapter IV, Section 2.3, of the University Code is constitutionally infirm by reason of vagueness which would cause men of common intelligence to be confused about the conduct allowed or proscribed thereby, and therefore cannot be the basis for disciplinary action even if the conduct giving rise to such action could have been properly proscribed under a properly drawn regulation.

V.

Chapter IV, Section 2.3, is additionally constitutionally infirm and unenforceable because its terms and provisions are so overbroad as to reach conduct which is constitutionally protected, and therefore violates the due process clause of the Fourteenth Amendment and the provisions of the First Amendment as embodied in the Fourteenth Amendment.

VI.

By reason of the substantive unconstitutionality of the section of the University Code upon which the Regents relied in discharging the plaintiff, the Regents cannot constitutionally rely thereon and the plaintiff must be reinstated and compensated for the loss of earnings occasioned by his improper dismissal.

VII.

This Court has the power to order the defendants sued in their representative capacities to reinstate the plaintiff and may further order such defendants to pay to the plaintiff all his back pay, consisting of wages owing from the date of dismissal to the date of reinstatement, diminished by the plaintiff's earnings, if any, during the period of his dismissal.

VIII.

The proper test as to whether those defendants sued in their individual capacities are entitled to rely upon a claim of governmental immunity to defeat the plaintiff's claim is not whether they were performing a discretionary function but, rather, whether they acted in good faith or were guilty of malice in discharging the plaintiff. There are no genuine issues of material fact in dispute between the parties which require that the motions of the defendants for summary judgment be granted.

IX.

The defense of qualified governmental immunity is not available to any of the defendants sued in their representative capacities.

DATED: July 19, 1973.

Roger D. Foley
District Judge

Appendix C

In the United States District Court
for the District of Nevada

Paul S. Adamian, Plaintiff, vs. The University of Nevada, the Board of Regents of the University of Nevada, Dr. Louis E. Lombardi, Fred M. Anderson, Procter E. Hug, William W. Morris, Helen R. Thompson, James H. Bilbray, Archie C. Grant, Paul McDermott, Harold J. Jacobsen, Mel Steninger, Molly Knudtsen, and John Does I, II, III, IV, V, VI, VII and VIII. Defendants.	Civil R-2530

[July 20, 8:31 A.M., 1973]

SUMMARY JUDGMENT

Upon consideration of the defendants' motion for summary judgment and the plaintiff's motion for partial summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, and upon consideration of the record herein, and good cause appearing therefor,

IT IS ORDERED that the plaintiff's motion for partial summary judgment against the defendants sued in their representative capacities be, and the same is, hereby granted.

IT IS FURTHER ORDERED that the defendants HAROLD J. JACOBSEN, FLORA DUNGAN, FRED M. ANDERSON, M. D., JAMES L. BUCHANAN II, NEDRA JOYCE, LOUIS E. LOMBARDI, M. D., WILLIAM W. MORRIS, MEL STENINGER and HELEN R. THOMPSON, as representatives of the Board of Regents of the University of Nevada, shall forthwith reinstate the plaintiff PAUL S. ADAMIAN to his position as a tenured professor of English at the University of Nevada, Reno campus, with all the benefits, increments, status and wages which have accrued to such position since December 12, 1970, as though the plaintiff had never been discharged from such position.

IT IS FURTHER ORDERED that the defendants HAROLD J. JACOBSEN, FLORA DUNGAN, FRED M. ANDERSON, M. D., JAMES L. BUCHANAN II, NEDRA JOYCE, LOUIS E. LOMBARDI, M. D., WILLIAM W. MORRIS, MEL STENINGER and HELEN R. THOMPSON shall forthwith, by proper resolution adopted at a duly convened meeting of the Board of Regents of the University of Nevada, approve the payment from appropriated funds to the plaintiff in an amount equal to the salary he would have received from the date of his discharge until the date he is reinstated on the payroll of the University of Nevada, in accordance with this order, with interest at the rate of 7% per annum, reduced by any salary the plaintiff may have received during the period of his discharge.

IT IS FURTHER ORDERED that the motion for summary judgment made on behalf of the defendant members of the Board of Regents who comprised the Board of Regents of the University of Nevada on December 12, 1970, against whom relief was sought in their individual capacities by plaintiff, is granted, but denied as to the relief sought in their representative capacities.

DATED: July 19, 1973.

Roger D. Foley

.....

District Judge

Appendix D

In the United States District Court
for the District of Nevada

Paul S. Adamian, Plaintiff, vs. The University of Nevada, the Board of Regents of the University of Nevada, Dr. Louis E. Lombardi, Fred M. Anderson, Procter E. Hug, William W. Morris, Helen R. Thompson, James H. Bilbray, Archie C. Grant, Paul McDermott, Harold J. Jacobsen, Mel Steninger, Molly Knudtsen, and John Does I, II, III, IV, V, VI, VII and VIII. Defendants.	Civil R-2530

[August 30, 1:45 P.M., 1973]

FINAL JUDGMENT ON LESS THAN ALL CLAIMS

An Order, having been entered herein, granting partial summary judgments, and this Court, having certified that there was no just reason for delay and expressly directing the entry of final judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, final judgment is therefore entered, as follows:

1. It is ordered that defendants HAROLD J. JACOBSEN, FLORA DUNGAN, FRED M. ANDERSON, M.D.,

JAMES L. BUCHANAN II, NEDRA JOYCE, LOUIS E. LOMBARDI, M.D., WILLIAM W. MORRIS, MEL STENINGER and HELEN R. THOMPSON, as representatives of the Board of Regents of the University of Nevada, shall forthwith reinstate the plaintiff PAUL S. ADAMIAN to his position as a tenured Professor of English at the University of Nevada, Reno campus.

2. That Summary Judgment is granted to defendants WILLIAM W. MORRIS, HELEN R. THOMPSON and MEL STENINGER in their individual capacities on the grounds that they were not members of the Board of Regents of the University of Nevada when the plaintiff was terminated.

3. .That Summary Judgment is granted to defendant JAMES H. BILBRAY, in his individual capacity, on the grounds that, although he was a member of the Board of Regents of the University of Nevada when the plaintiff was terminated, he voted against the termination.

4. Summary Judgment is granted to defendant ARCHIE C. GRANT, in his individual capacity, on the grounds that although he was a member of the Board of Regents of the University of Nevada when plaintiff was terminated, he was not present when the Board of Regents acted to terminate the plaintiff.

5. Summary Judgment is granted to defendants LOUIS E. LOMBARDI, FRED M. ANDERSON, PROCTER R. HUG, PAUL McDERMOTT, HAROLD J. JACOBSEN and MOLLY KNUDTSEN, in their individual capacities, who were members of the Board of Regents of the Uni-

versity of Nevada on December 12, 1970 and voted for the termination of plaintiff, on the grounds that there are no genuine issues of material fact as to the good faith of those defendants, who comprised the Board of Regents on December 12, 1970, in determining that plaintiff should be discharged from his position as a tenured professor of such University.

DATED this 30th day of August, 1973.

Roger D. Foley
District Judge

Appendix E

United States Court of Appeals
for the Ninth Circuit

Paul S. Adamian, Plaintiff-Appellee, vs. Harold J. Jacobsen, Flora Duncan, Fred M. Anderson, M.D., James L. Buchanan II, Nedra Joyce, Louis E. Lombardi, M.D., William W. Morris, Mel Steninger, Helen R. Thompson, as constituting the present Board of Regents of the University of Nevada, Defendants-Appellants.	No. 73-2921

[September 24, 1975]

OPINION

Appeal from the United States District Court
for the District of Nevada

Before: MERRILL, CARTER and CHOY, Circuit Judges.

CHOY, Circuit Judge:

Paul S. Adamian, a tenured Assistant Professor of English at the University of Nevada at Reno, participated in a demonstration during Governor's Day ceremonies in the campus stadium in 1970, protesting the Cambodia invasion and the Kent State University killings. On prior application of the demonstrators, the Board of Regents (the

Board) had given them permission to march three times around the stadium track. The protest went beyond the march, however. Adamian (yelling, "Let's stop this mother ....") and others tried to stop a motorcade bringing officials for the ceremonies into the stadium; led by Adamian the demonstrators then made loud noises to disrupt the ceremonies. Still later, Adamian left the stands, joined a group on the field and motioned other demonstrators on to the field, thus creating a danger of violent confrontation between two bodies of people.

The Board directed that charges be brought against Adamian. He was summoned before a Faculty Senate hearing committee which found that his conduct had violated chapter 4, section 2.3, of the University Code, and thus constituted "adequate cause" under the Code for his dismissal. Although the committee recommended that his employment not be terminated unless he indulged in similar conduct in the future, the Board rejected the recommendation and ordered Adamian's dismissal.

Adamian brought this civil rights action in district court, claiming that the University had deprived him of his first amendment rights of speech and assembly. On July 20, 1973, the district court held that section 2.3 was invalid because vague and overbroad. The court entered partial summary judgment for Adamian, and ordered the present members of the Board of Regents in their representative capacities to reinstate Adamian. It also ordered back pay for Adamian in an amount to be later determined. On August 30, 1973, the court certified its order of reinstatement as a final judgment, pursuant to Fed.R.Civ.P. 54(b). The members of the Board appeal from that order. We reverse and remand.

Jurisdiction on Appeal

The July 20 order granting an injunction was an appealable interlocutory order. 28 U.S.C. § 1292(a)(1). Because the regents did not file an appeal from this order within 30 days as required by 28 U.S.C. § 2107. Adamian argues that the regents' appeal is untimely. But an interlocutory appeal is permissive, not mandatory, and the regents were free to await the August 30 final judgment and to appeal under 28 U.S.C. § 1291. *Caradelis v. Refineria Panama, S.A.*, 384 F.2d 589, 591 n.1 (5th Cir. 1967); *Bingham Pump Co. v. Edwards,* 118 F.2d 338, 339 (9th Cir.), *cert. denied,* 314 U.S. 656 (1941).

University Code, Section 2.3

The University Code of the University of Nevada requires that tenured professors be dismissed only for adequate cause, and the Board of Regents concluded that "adequate cause existing, [Adamian's] employment as a member of the Faculty of the University of Nevada, Reno is terminated this date." The term "adequate cause" must be interpreted in the context of traditional standards of faculty behavior; its vagueness is a necessary result of the many forms of faculty conduct which might justify dismissal. The Supreme Court's discussion of "cause" for dismissal from the civil service applies equally to academic tenure:

> We do not believe that Congress [here, the state] was confined to the choice of enacting a detailed code of employee conduct, or else granting no job protection at all.

Arnett v. Kennedy, 416 U.S. 134, 159 (1974).

Nevertheless, when a statute or regulation by its vagueness or overbreadth threatens to deter the exercise of first amendment freedoms, we require of it greater precision and specificity than would be necessary to fulfill fifth or fourteenth amendment due process requirements. "Adequate cause" is certainly too imprecise a standard if expressive activity is understood to fall within its scope. If we were faced with a federal statute or regulation, we would cure this imprecision by construing it to exclude any application to constitutionally protected speech or conduct. *Arnett*, 416 at 162; *United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548, 571 (1973). We cannot so construe a state regulation, however; we are required to base our judgment of its facial validity only on its meaning as authoritatively construed by a state court or agency. *Gooding v. Wilson*, 405 U.S. 518, 520 (1972).

The University Code, chapter 4, section 2.3, clarifies the meaning to be given "adequate cause" when that term is applied to a professor's expressive activity:

> The faculty member is a citizen, a member of a learned profession, and a representative of the University. When he speaks or writes as a citizen, he will be free from University censorship or discipline, but his special position in the community imposes special obligations. As a man of learning and as an educator, he knows that the public may judge his profession and this University by his utterances. At all times he strives to be accurate, to exercise appropriate restraint, to show respect for the opinion of others, and

> to make every effort to indicate that he is not a spokesman for this University.

Section 2.3, read in isolation, seems only to insure that a professor will be free of censorship when speaking as a citizen; the admonitions of the last sentence appear merely hortatory. The Board of Regents has construed the last sentence as stating adequate causes for dismissal, however, and we must give great deference to this construction of a regulation by the state agency which issued and enforces it. *See Jablon v. Trustees of the California State Colleges*, 482 F.2d 997, 999 (9th Cir. 1973), *cert. denied*, 414 U.S. 1163 (1974). The regents explicity charged Professor Adamian with having violated this section, and we accept it as defining the university's construction of "adequate cause" for dismissal of a professor based on his non-academic speech or writing.[1]

Vagueness and Overbreadth

The closely-related first amendment doctrines of vagueness and overbreadth permit a defendant to assert the

---

[1]*See* Interpretation 3 of the 1940 Statement of Principles, agreed upon by the Association on Nov. 7-8, 1940:

> If the administration of a college or university feels that a teacher has not observed the admonitions of Paragraph (c) of the section on Academic Freedom [section 2.3] and believes that the extramural utterances of the teacher have been such as to raise grave doubts concerning his fitness for his position, it may proceed to file charges under Paragraph (a)(4) of the section on *Academic Tenure*. In pressing such charges the administration should remember that teachers are citizens and should be accorded the freedom of citizens. In such cases the administration must assume full responsibility and the American Association of University Professors and the Association of American Colleges are free to make an investigation.

Academic Freedom and Tenure: A Handbook of the American Association of University Professors 39 (1969).

invalidity of a statute because of its potential encroachment on first amendment freedoms, even in cases where the defendant's conduct itself is unprotected by the first amendment. We apply these doctrines quite rigorously when a statute is directed at "pure speech," especially to its expressive content. *Goodwin v. Wilson*, 405 U.S. 518 (1972); *Lewis v. City of New Orleans*, 415 U.S. 130 (1974); *Stromberg v. California*, 283 U.S. 359 (1931);[2] On the other hand, if the state has attempted to regulate conduct for reasons unrelated to any expressive content, and the regulation has an incidental inhibiting effect on expression, in determining its facial validity we must weight the legitimate interest of the state in regulating the conduct against the potential deterrence, or "chill," of the exercise of first amendment freedoms. *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973); *Parker v. Levy*, 417 U.S. 733, 760 (1974).[3] The balancing required of us in deciding whether to apply the vagueness and overbreadth doctrines resembles that required in determining whether a statute regulating con-

[2]The Supreme Court has apparently applied the overbreadth doctrine equally rigorously to topless dancing as a form of expression. The Court, in an opinion by Mr. Justice Rehnquist, held facially invalid a town ordinance banning all topless dancing, observing that it had suggested in *California v. LaRue*, 409 U.S. 109, 118 (1972), that some topless dancing might be entitled to first amendment protection. The Court did not engage in a *Broadrick*-type analysis to determine the legitimate scope of such an ordinance in relation to its possible application to protected expressive activity. Doran v. Salem Inn, Inc., 43 U.S.L.W. 5039 (U.S., June 30, 1975).

[3]In *Parker*, the Court dismissed overbreadth challenges to the military regulations prohibiting conduct "unbecoming an officer and a gentleman" and "to the prejudice of good order and discipline in the armed forces." The court held that the " ' "weighty countervailing policies," ' *Broadrick, supra*, at 611, which permit the extension of standing in First Amendment cases involving civilian society, must be accorded a great deal less weight in the military context." 417 U.S. at 760.

duct constitutes an impermissible abridgement of first amendment interests. *See, e.g., Grayned v. City of Rockford*, 408 U.S. 104 (1972); *United States v. O'Brien*, 391 U.S. 367 (1968); *Cameron v. Johnson*, 390 U.S. 611 (1968).

Section 2.3 requires that a professor strive for accuracy, restraint, and respect for the opinions of others. On its face, section 2.3 is directed at "pure speech," not at expressive conduct. The state cannot regulate any protected speech on the basis of content. *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92 (1972). Even in the case of "pure speech," however, the deference which must be accorded first amendment interests attenuates when the state attempts to regulate not the expressive content of the speech, but its external effects, such as noise. *Grayned, supra; Kovacs v. Cooper*, 336 U.S. 77 (1949); *contrast Saia v. New York*, 334 U.S. 558 (1948).

Section 2.3 is neutral as to content; it regulates the manner in which that content is expressed, much as do statutes aimed at excessive noise. Therefore, in examning its facial validity, we find it appropriate to apply the more rigorous *Broadrick* test, *i.e.*, whether any overbreadth perceived is "not only . . . real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick*, 413 U.S. at 615.

First amendment protections are not "shed . . . at the schoolhouse gate." *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969). It is true that we will strike the balance between the interests of the state and of the individual somewhat differently when the citizen is an employee of the state. *Pickering v. Board*

of Education, 391 U.S. 563, 568 (1968); *United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548, 564 (1973). The desire to maintain a sedate academic environment, "to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint," is not an interest sufficiently compelling, however, to justify limitations on a teacher's freedom to express himself on political issues in vigorous, argumentative, unmeasured, and even distinctly unpleasant terms. *Tinker*, 393 U.S. at 509. *See Los Angeles Teachers Union v. Los Angeles City Board of Education*, 71 Cal. 2d 551, 455 P.2d 827, 78 Cal. Rptr. 723 (1969). Only where expressive behavior "involves substantial disorder or invasion of the rights of others" may it be regulated by the state. 393 U.S. at 513. Self-restraint and respect for all shades of opinions, however desirable and necessary in strictly scholarly writing and discussion, cannot be demanded on pain of dismissal once the professor crosses the concededly fine line from academic instruction as a teacher to political agitation as a citizen—even on the campus itself.

On its face, section 2.3's requirement that a professor exercise appropriate restraint and show respect for the opinions of others is susceptible of interpretations which would render it overbroad under *Tinker*, and would thus deter the vigorous advocacy of unpopular political ideas. We take notice, however, that section 2.3 was adopted almost verbatim from the 1940 Statement of Principles of the American Association of University Professors. Academic Freedom and Tenure: A Handbook of the American Association of University Professors 36 (1969). In

1963, the Association construed the Statement's language regarding academic freedom in its Advisory Letter No. 11: Extramural Utterances. *Id.* at 132-34:

> It is the view of this Office that the term 'appropriate restraint,' as used above, refers solely to choice of language and to other aspects of the manner in which a statement is made. It does not refer to the substance of a teacher's remarks. * * *
>
> 'A violation may consist of serious intemperateness of expression, intentional falsehood, incitement of misconduct, or conceivably some other impropriety of circumstance. It may not lie, however, in the error or unpopularity, even though gross, of the ideas contained in the utterance.'
>
> [A] determination concerning alleged violation of the standard of academic responsibility may not be made except on the basis of the criteria elaborated above.
> * * *
>
> [A]cademic consideration of the extramural utterances of a faculty member shall occur only when the remarks raise 'grave doubts' concerning his fitness for his position . . . .
>
> [T]he disciplining of a faculty member for exercising the rights of free speech guaranteed to him as a citizen by the Constitution of the United States necessarily raises such fundatmental issues that institutions are cautioned to take such action only under extraordinary circumstances. Neither the error nor the unpopularity of ideas or opinions may provide an adequate basis for such disciplinary action, whatever temporary embarrassment these views may bring to the institution.

The Association's construction so narrows the language of section 2.3 as to eliminate any overbreadth resulting in

facial invalidity of the section. The Handbook emphasizes that section 2.3 does not "refer to the substance of a teacher's remarks." Moreover, the Association's repeated assurance that a professor will not be penalized for the error or unpopularity of his ideas reassures us that the Association intended to assure a professor his full measure of first amendment rights. While the Association's construction is itself not entirely free of overbreadth problems,[4] we believe that it circumscribes within constitutional limits, in so far as is practicable, those situations in which a faculty member is subject to discipline. Any overbreadth remaining in the Association's interpretation of proper grounds for dismissal falls short of *Broadrick's* requirement of "substantial overbreadth."

That the University has adopted the Statement of Principles virtually word for word suggests that it also accepts the narrowing interpretation placed on it by the Association. We remand the case to the district court with instruction to hear testimony from the regents in order to determine whether the regents' construction of section 2.3 is the same as that of the American Association of University Professors.

Reversed and remanded.

---

[4]We might have some doubt whether the phrase "serious intemperateness of expression," standing alone, would provide a sufficiently narrow standard for a professor's "extramural" speech. Nevertheless, the Association emphasizes that such a lack of restraint does not per se justify dismissal, but only when it raises "grave doubts" concerning the professor's fitness for his position. While even this latter standard is somewhat susceptible to an overbroad application, we do not believe that such a standard encompasses so much protected speech as to render section 2.3 "substantially" overbroad. Whatever overbreadth lingers in the section may be cured on a case-by-case basis in those situations where the section is applied to punish the exercise of protected speech.

Appendix F

In the United States District Court
for the District of Nevada

Paul S. Adamian,

Plaintiff,

vs.

The University of Nevada, the Board of Regents of the University of Nevada, Dr. Louis E. Lombardi, Fred M. Anderson, Procter R. Hug, William W. Morris, Helen R. Thompson, James H. Bilbray, Archie C. Grant, Paul McDermott, Harold J. Jacobsen, Mel Steninger, Molly Knudtsen, and John Does I, II, III, IV, V, VI, VII and VIII,

Defendants.

} Civil R-2530

[June 21, 10:48 A.M., 1976]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. FACTUAL AND PROCEDURAL BACKGROUND

This case arose from the dismissal of a college professor who participated in a campus demonstration in May 1970, protesting the Cambodian invasion and the Kent State killings. Plaintiff Paul S. Adamian was a tenured Assistant Professor of English at the University of Nevada at Reno. Defendants originally were the University of Nevada, the Board of Regents, the Board members in their individual and representative capacities, and Does I through VIII.

The Board of Regents had given a group of demonstrators permission to march three times around the stadium track during Governor's Day ceremonies in May 1970. The protest went beyond the march, however. Adamian tried to stop a motorcade bringing officials into the stadium for the ceremonies. Led by Adamian, the demonstrators made raucous noises to disrupt the ceremonies. Adamian later left the stands, joined a group on the field, and motioned other demonstrators onto the field, creating a danger of violent confrontation between two bodies of people.

The Board of Regents directed that charges be brought against Adamian. A Faculty Senate Hearing Committee found that his conduct constituted "adequate cause" for dismissal in that he had violated Chapter 4, Section 2.3 of the University Code which provides:

> "The faculty member is a citizen, a member of a learned profession, and a representative of this University. When he speaks or writes as a citizen, he will be free from University censorship or discipline, but his special position in the community imposes special obligations. As a man of learning and as an educator, he knows that the public may judge his profession and this University by his utterances. At all times, he strives to be accurate, to show respect for the opinions of others, and to make every effort to indicate that he is not a spokesman for this University."

However, the committee recommended that his employment not be terminated unless he indulged in similar conduct in the future. Nevertheless, the Board of Regents rejected the recommendation and ordered Adamian's dismissal.

In July 1971, plaintiff filed this civil rights action under 42 USC § 1981 and 42 USC § 1985 alleging the following: (1) Violation of his First Amendment freedom of speech by dismissing him for protesting the Cambodian invasion and the Kent State killings (Count 1); (2) Violation of his First Amendment right to assemble and to petition the government for redress of grievances by dismissing him for participating in the demonstration (Count 2); (3) Denial of his Fourteenth Amendment right not to be deprived of a property interest (his tenured professorship) without due process in that the Board of Regents dismissed him after the Faculty Senate Committee had recommended that he only be censured (Count 3); and (4) Denial of his Fourteenth Amendment right not to be deprived of a property interest without due process by dismissing plaintiff on grounds (disruption of University function) which were unrelated to the charges brought against him (violation of obligations of professor when speaking as a private citizen) (Count 4). Plaintiff seeks reinstatement as professor, recovery of back pay, general damages of $50,000, and punitive damages of $25,000. This court has jurisdiction under 28 USC § 1343 and 28 USC § 1331.

In March 1972, Judge Phillip Wilkins, by assignment from the Eastern District of California, ruled on defendants' motion to dismiss as follows: (1) Dismissed the University of Nevada and the Board of Regents because they are not "persons" within the meaning of 42 USC § 1983; (2) Dismissed Does I through VIII on ground that use of fictitious parties is improper in federal court; (3) Held that the complaint states a cause of action under 42 USC § 1983 as to the Board of Regents as individuals

even though plaintiff sought relief only under 42 USC § 1981 and 42 USC § 1985; and (4) Granted defendants' motion to strike the allegations of conspiracy in plaintiff's complaint because they were vague and conclusory. In April 1972, Judge Bruce Thompson disqualified himself and transferred the case to Judge Roger Foley.

In April 1973, Judge Foley ruled on plaintiff's and defendants' cross motions for summary judgment as follows: (1) Granted plaintiff's partial motion for summary judgment on the ground that Chapter 4, Section 2.3 of the University Code was unconstitutionally vague and overbroad and ordered plaintiff reinstated as professor with back pay; (2) Denied summary judgment as to all defendants in their representative capacity; (3) Granted summary judgment as to certain defendants in their individual capacity who were not on the Board of Regents at the time of plaintiff's dismissal, who voted against dismissal, or who were absent from the meeting of the Board of Regents when the vote was taken. *Adamian v. Jacobsen,* 359 F.Supp. 825 (D.Nev. 1973).

In July 1973, Judge Foley granted defendants' motion for rehearing and ruled as follows: (1) Reaffirmed granting plaintiff's partial motion for summary judgment on the ground that the University Code was unconstitutionally vague and overbroad and ordered plaintiff reinstated as professsor with back pay; (2) Reaffirmed denial of summary judgment as to all defendants in the representative capacity; *but* (3) Granted summary judgment as to *all* defendants in their individual capacity on the ground that (1) they have qualified immunity for acts done in good

faith within the scope of their official duties and (2) there was no genuine issue of material fact as to their good faith in dismissing plaintiff. This left as defendants only the individual members of the Board of Regents in their representative capacity.

Defendants appealed from the order granting plaintiff's motion for partial summary judgment. The matter was certified as a final judgment for appeal purposes. The order reinstating plaintiff as professor was stayed pending appeal. In September 1975, the Court of Appeals reversed and remanded. *Adamian v. Jacobsen,* 523 F.2d 929 (9th Cir. 1975). The Circuit noted that (1) section 2.3 was adopted almost verbatim from the 1940 statement of Principles of the American Association of University Professors and (2) the Association had given section 2.3 a narrow construction which made it constitutionally valid. The case was remanded to the district court with instructions to hear testimony from the Regents in order to determine whether the Regents' construction of section 2.3 was the same as that of the AAUP.

In January 1976, Judge Foley conducted the evidentiary hearing mandated by the Circuit and ordered that: (1) Plaintiff's motion for partial summary judgment was denied on the ground that a genuine issue of material fact exists as to whether the Regents followed the AAUP's construction of section 2.3; (2) The case be transferred to Judge Thompson in Reno for all further proceedings. Judge Thompson again disqualified himself and this Court was assigned to hear the matter. In April 1976, this Court denied defendants' second motion to dismiss.

The case came on for court trial on May 24, 1976. Both parties stipulated that the facts relating to the events of May 5, 1970, may be determined by the Court from the transcript of the administrative hearing and from the exhibits received in evidence. The parties also agreed that the only issue of fact to be determined at trial was whether the Board of Regents construction of Chapter 4, Section 2.3 of the University Code was the same as that of the American Association of University Professors at the time of plaintiff's termination. This opinion shall constitute the Court's findings of fact and conclusions of law.

II. LAW AND DISCUSSION

A. *Issues of Law*

The following issues of law are before this Court: (1) Is Chapter 4, Section 2.3 of the University Code unconstitutionally vague or overbroad; (2) Did plaintiff's termination violate his Fourteenth Amendment right to substantive due process; (3) Did plaintiff's termination violate his Fourteenth Amendment right to procedural due process; (4) Did plaintiff's termination violate his First Amendment right to freedom of speech; (5) Did plaintiff's termination violate his First Amendment right to freedom of assembly; (6) Did plaintiff's termination deny him his Fourteenth Amendment right to equal protection of the laws.

B. *Standard of Review*

Defendants contend that plaintiff is only entitled to the limited review set forth in *Bowers v. Campbell,* 505 F.2d 1155 (9th Cir. 1974). But in that case, plaintiff invoked

federal jurisdiction under both the Civil Rights Acts (42 USC § 1981 and 28 USC § 1343) and the Administrative Procedures Act (5 USC § 701 et seq.). Here, plaintiff sues only under the Civil Rights Acts. Therefore, this Court holds that plaintiff is entitled to a de novo trial on the merits.

C. *Vagueness and Overbreadth*

Plaintiff first contends that the university code provision (Chapter 4, Section 2.3) that he was accused of violating is unconstitutionally vague and overbroad. In July 1973, Judge Foley held that Section 2.3 was invalid because vague and overbroad. In September 1975, the Court of Appeals reversed, noting that (1) Section 2.3 was adopted almost verbatim from the 1940 Statement of Principles of the American Association of University Professors and (2) the Association had given Section 2.3 a narrow construction which made it constitutionally valid. The case was remanded to the district court with instruction to hear testimony from the Regents in order to determine whether the Regents' construction of Section 2.3 was the same as that of the AAUP. *Adamian v. Jacobsen, supra* at 935.

At the trial, seven members of the Board of Regents testified that their construction of Section 2.3 was the same as the American Association of University Professors. No contradictory evidence was introduced by plaintiff. Therefore, this Court finds as a fact that the Regents' construction of Section 2.3 is the same as that of the AAUP. Consequently, this Court holds that Section 2.3 is not unconstitutionally vague or overbroad.

D. *Substantive Due Process*

Plaintiff appears to argue that he was denied substantive due process because (1) his activities did not raise grave doubts concerning his fitness for his position; (2) the Board of Regents failed to make specific findings on whether he committed the charged acts; and (3) there was an absence of grounds for dismissal as a matter of law. However, the guaranty of substantive due process demands only that the law shall not be arbitrary or capricious. To be arbitrary or capricious, the Board's reason for dismissing plaintiff must be either (1) trivial, (2) unrelated to the education process, or (3) wholly unsupported by facts. *Drown v. Portsmouth Schl Dist.*, 451 F.2d 1106 (1st Cir. 1971).

The Board of Regents in its "Decision Concerning Dr. Paul Adamian" (Exhibit G) found that: (1) Dr. Adamian had occupied a position of prominence in the May 5, 1970, demonstration which disrupted the Governor's Day ceremonies in Mackay Stadium; (2) Dr. Adamian with others did attempt to stop the Governor's motorcade into the Stadium; (3) Dr. Adamian encouraged students to drown out the ceremonies after the University President had requested them to be quiet; (4) Dr. Adamian left the stands, ran out onto the field where the ceremonies were taking place, and was followed by others in the stands; (5) these incidents posed a danger of potential violence; and (6) the conduct of Dr. Adamian was antithetical to his obligations as a member of the faculty and constituted adequate cause for the termination of his employment. These reasons for dismissal are neither trivial, unrelated to the education process, nor unsupported by facts. The record

of the administrative hearing provided the Board with ample evidence to justify these findings. Hence, this Court holds that plaintiff was not denied substantive due process. *Accord, Shaw v. Board of Trustees,* 396 F.Supp. 872, 889 (D. Md. 1975).

E. *Procedural Due Process*

Plaintiff also maintains that he was denied procedural due process by the Board of Regents. It is true that a tenured teacher cannot be terminated without a hearing in which he is informed of the grounds for dismissal and given an opportunity to challenge their sufficiency. *Perry v. Sindermann,* 408 F.2d 593 (1972). However, here plaintiff received a full and fair hearing on the charges made against him. He was represented by counsel. He was afforded the opportunity to confront and cross-examine witnesses against him. The undisputed testimony at trial was that each of the regents made their decision to terminate Dr. Adamian solely upon the transcript of the administrative hearing. The Board of Regents issued written findings subject to judicial review. Therefore, this Court holds that plaintiff was not denied procedural due process. *Accord, Kinsella v. Board of Education,* 378 F.Supp. 54 (W.D. N.Y. 1974); *Shaw v. Board of Trustees, supra* at 887.

F. *Freedom of Speech*

Plaintiff next contends that his termination violated his First Amendment right to freedom of speech. The controlling law is to be found in the Supreme Court's decision in *Pickering v. Board of Education,* 391 U.S. 563 (1968). The Board in Pickering dismissed a teacher who publicly

criticized the school board in a letter to a newspaper. In reversing, the Court held that "a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment." However, the Court distinguished a teacher's writing of a letter to the editor as a citizen from statements made by a teacher that "interfered with the regular operation of the schools." *Id.* at 573.

The instant case is similar to *Whitsel v. Southeast Local School District,* 484 F.2d 1222 (6th Cir. 1973). In *Whitsel,* a teacher was fired who addressed an unauthorized high school student assembly, protesting dismissal of a student teacher who had left the high school campus without permission to attend the infamous Kent State demonstration. The teacher spoke to the assembled students after the school principal and superintendent had vainly ordered the students to return to their classes. His remarks encouraged the students to disobey the directions given to the students by his superiors. *Id.* at 1228.

The Sixth Circuit held that the statements Whitsel voiced were outside the protection of the First Amendment. The Court distinguished *Pickering* on the ground that Whitsel's action "interfered with the regular operation of the schools." The Court pointed out that the teacher's remarks were not made in his capacity as a concerned citizen, but in the capacity of a school teacher during school hours on school property. The Court found that Whitsel's words "went beyond the mere advocacy of ideas and counselled a course of action." *Id.* at 1228.

Professor Adamian played a prominent role in unauthorized student protest activities during school hours on school property. He continued to lead raucous catcalls after the University President had asked the audience to be quiet. His conduct in attempting to stop the Governor's motorcade, in leading raucous catcalls, and in charging onto the field during the ceremonies encouraged students to participate in similar activities. His acts caused a substantial and material disruption of a duly constituted university function which created a danger of violence. This Court can only conclude that plaintiff's activities went beyond the mere advocacy of ideas and counselled a course of action, interfered with the regular operation of the school, and consequently was outside the protection of the First Amendment. Therefore, this Court holds that plaintiff was not denied freedom of speech. *Accord, Mabey v. Reagan.* No. 74-3413 (9th Cir. June 1, 1976).

G. *Freedom of Assembly*

Plaintiff further argues that his termination violated his First Amendment right to freedom of assembly. This Court does not agree. No action of the Board of Regents interfered with plaintiff's right to associate with whomever he chose. Therefore, this Court holds that plaintiff was not denied freedom of assembly. *Accord, Shaw v. Board of Trustees, supra* at 890.

H. *Equal Protection*

Plaintiff lastly maintains that he was denied equal protection by being singled out for punishment while other equally culpable professors were never disciplined. To support his contention, he points to the complicity statements signed by a number of students. However, none of the

signatories to the complicity statements indicate that they were faculty members. Furthermore, the record does not show that other professors played as prominent a role in the demonstration as plaintiff.

Equal protection does not require that all persons be treated equally all of the time. Rather, where no fundamental right or suspect classification is involved, the Constitution guarantees only that differences in treatment must have a rational basis. *Reed v. Reed,* 404 U.S. 71, 76 (1971). This Court finds that Professor Adamian's role in the demonstration was more prominent than that of other faculty members and, consequently, that any difference in the treatment of plaintiff had a rational basis. Therefore, this Court holds that plaintiff was not denied equal protection of the laws. *Accord, Simcox v. Board of Education,* 443 F.2d 40, 45 (7th Cir. 1971); *Whitsel v. Southeast Local School District, supra* at 1229.

The Clerk shall enter a judgment for the defendants on all counts.

DATED: June 18, 1976.

HOWARD B. TURRENTINE
Howard B. Turrentine,
United States District Judge

COPY TO:
Charles E. Springer, Esq.
333 Flint Street
Reno, Nevada 89501
Thomas G. Bell, Esq.
Special Deputy Attorney General
300 South Fourth Street, No. 700
Las Vegas, Nevada 89101

Appendix G

United States Court of Appeals
for the Ninth Circuit

Paul S. Adamian, Plaintiff-Appellant, vs. The University of Nevada, et al., Defendants-Appellees.	No. 76-2866

[March 7, 1979]

ORDER

Before: DUNIWAY and CHOY, Circuit Judges
and POOLE, District Judge

Judges Duniway and Choy have concluded that they should disqualify themselves from participating in the decision of this case. Accordingly, the submission of this case for decision is vacated, and the case will be reheard before another panel to be selected hereafter.

Appendix H

United States Court of Appeals
for the Ninth Circuit

Paul S. Adamian, Plaintiff-Appellant, vs. Dr. Louis E. Lombardi, et al., Defendants-Appellees.	No. 76-2866

[October 16, 1979]

OPINION

Appeal from the United States District Court
for the District of Nevada

Before: BREITENSTEIN* and DOYLE,** Circuit Judges, and POOLE,*** District Judge

POOLE, District Judge:

On this, the second appeal in this matter, we review the discharge of Paul S. Adamian, an Assistant Professor of

*Honorable Jean S. Breitenstein, Senior Circuit Judge, United States Court of Appeals, Tenth Circuit, sitting by designation of the Intercircuit Assignment Committee.

**Honorable William E. Doyle, Circuit Judge, United States Court of Appeals, Tenth Circuit, sitting by designation of the Intercircuit Assignment Committee.

***Honorable Cecil F. Poole, United States District Judge for the Northern District of California, sitting by designation.

After this appeal had been argued and submitted, Judges Duniway and Choy concluded that they should disqualify themselves from further participation in the decision. By order of March 6, 1979, submission for decision was vacated. Subsequently, the Chairman of the Intercuit Assignment Committee certified consent for Judges Breitenstein and Doyle to constitute a new hearing panel along with Judge Poole.

English at the University of Nevada, at Reno, arising from his conduct while participating in a campus demonstration during Governor's Day ceremonies, May 5, 1970, in the university stadium. The demonstration was in protest against the Cambodian invasion and the Kent State University killings. Our opinion on the prior appeal (*Adamian v. Jacobsen,* 523 F.2d 828 (9th Cir. 1975)), described the facts as follows at 931:

> "* * * On prior application of the demonstrators, the Board of Regents (the Board) had given them permission to march three times around the stadium track. The protest went beyond the march, however. Adamian (yelling, 'Let's stop this mother — — —.') and others tried to stop a motorcade bringing officials for the ceremonies into the stadium; led by Adamian the demonstrators then made loud noises to disrupt the ceremonies. Still later, Adamian left the stands, joined a group on the field and motioned other demonstrators onto the field, thus creating a danger of violent confrontation between two bodies of people.
>
> "The Board directed that charges be brought against Adamian. He was summoned before a Faculty Senate hearing committee which found that his conduct had violated chapter 4, section 2.3, of the University Code, and thus constituted 'adequate cause' under the Code for his dismissal. Although the committee recommended that his employment not be terminated unless he indulged in similar conduct in the future, the Board rejected the recommendation and ordered Adamian's dismissal."

Adamian responded by filing a civil rights action in the district court under 42 U.S.C. § 1981 and § 1985,[1] alleging violation of his First Amendment speech rights and of his Fourteenth Amendment due process rights in depriving him of his tenured professorship, and in the manner by which, and the reasons for which, it was accomplished. He named as defendants the University, the Board of Regents and its members individually. He sought reinstatement, compensation for lost earnings, and damages for violation of his civil rights. The district court dismissed the University and the Board of Regents because neither state agency was a "person" within the meaning of the Civil Rights Act, 42 U.S.C. § 1983. *Whitner v. Davis,* 410 F.2d 24 (9th Cir. 1969). Action continued against all Regents in their representative capacities (F.R.Civ.P. 25(d)(1)) and against all Regents (who were such at the time of plaintiff's dismissal) in their individual capacities.

Adamian moved for partial summary judgment, arguing that Section 2.3 of the University Code, upon which the Regents relied in dismissing him, was unconstitutionally vague and over-broad, impinging upon his First Amendment rights of free speech and assembly, as well as violating his due process rights under the Fourteenth Amendment.

PRIOR RULINGS OF THE DISTRICT COURT

The district court examined the language of Section 2.3 which reads as follows:

> "The faculty member is a citizen, a member of a learned profession, and a representative of this Uni-

[1] In ruling on a motion to dismiss, the district court treated the action as an attempt to state a claim under 42 U.S.C. § 1983. On the first appeal, we treated the claim likewise.

> versity. When he speaks or writes as a citizen, he will be free from University censorship or discipline, but his special position in the community imposes special obligations. As a man of learning and as an educator, he knows that the public may judge his profession and this University by his utterances. At all times he strives to be accurate, to exercise appropriate restraint, to show respect for the opinions of others, and to make every effort to indicate that he is not a spokesman for this University."

In weighing plaintiff's challenge, the Court found irrelevant questions such as whether plaintiff had in fact received procedural due process, or whether his conduct could be construed to be proscribed by the Section. It invoked *Dombrowski v. Pfister,* 380 U.S. 479, 486, 85 S.Ct. 1116, 1121, 14 L.Ed.2d 22 as authority for allowing "attacks on overly broad statutes [involving constitutionally protected expression] with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity." It held that the code language was so over-broad that it could authorize a tenured professor's termination for utterances which are merely inaccurate, contrary to *Pickering v. Board of Education,* 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968); and so vague that men of common intelligence could differ as to its meaning. *NAACP v. Button,* 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963).

The District court entered summary judgment for plaintiff ordering his reinstatement and compensation for his loss of earnings. *Adamian v. University of Nevada,* 359 F.Supp. 825 (D.Nev. 1973). The Regents appealed. We

reversed. *Adamian v. Jacobsen,* 523 F.2d 929 (9th Cir. 1975).

FORMER OPINION—SECTION 2.3

Looking at the University of Nevada Code, this Court saw that it requires that tenured professors be dismissed only for adequate cause, and that in dismissing Adamian the Board of Regents had found adequate cause. The opinion held that, "the term 'adequate cause' must be interpreted in the context of traditional standards of faculty behavior; its vagueness is a necessary result of the many forms of faculty conduct which might justify dismissal." 523 F.2d at 932. The Court had in mind the common sense postulate that the lawmaker is not required to enact a detailed code of employee conduct. *Arnett v. Kennedy,* 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974). But it also noted that when such a regulation may impinge on First Amendment freedoms, "we require greater precision and specificity than would be necessary to fulfill Fifth or Fourteenth Amendment due process requirements." 523 F.2d at 932. Judged in this light, the standard of "adequate cause" could conceivably have broad enough sweep to include oppressive activity and thus be vulnerable to the possibility of infringing upon constitutionally protected speech or conduct.

But Judge Choy's carefully considered opinion emphasized the caution that, in the analysis of a state regulation, the judgment as to its facial validity must rest on its meaning "as authoritatively construed by [the appropriate] state court or agency [empowered to do so]." 523 F.2d at 932; and *see Gooding v. Wilson,* 405 U.S. 518, 92 S.Ct. 1103, 31 L.Ed.2d 408 (1972). The appropriate agency

here is the Board of Regents which found Adamian's conduct to be adequate cause for dismissal when examined in the light of Section 2.3. Most of the language of that section appeared to us to be "merely hortatory," but the Regents gave it a construction—particularly as to the last sentence—which had the effect of narrowing the standards by which to judge conduct appropriate for tenured faculty. That last sentence reads:

> "At all times he strives to be accurate, to exercise appropriate restraint, to show respect for the opinion of others, and to make every effort to indicate that he is not a spokesman for this University."

The Regents viewed this language as requiring that a professor seek accuracy, restraint, and that as a representative of his learned profession he display the educator's respect for the opinion of others. The record below suggested that the Regents viewed these words as referring not to pure speech, but to expressive conduct; as dealing with manner, with seemliness of expression, rather than with content. Such construction would be entitled to great deference. *Jablon v. Trustees of the California State Colleges*, 482 F.2d 997, 999 ((9th Cir. 1973), *cert. denied*, 414 U.S. 1163, 94 S.Ct. 926, 39 L.Ed.2d 116 (1974). Under these circumstances we thought it appropriate to apply the test which weighs the potentially "chilling effect" of possibly imprecise words against the interests of the state in the conduct at issue. This is the test of *Broadrick v. Oklahoma*, 413 U.S. 601, 615, 93 S.Ct. 2908, 2918, 37 L.Ed.2d 830 (1973) [involving a state "Hatch Act"], in which a majority of the court, through Mr. Justice White, stated:

> "To put the matter another way, particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute, must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."

"Substantial," the majority said, calls for "case-by-case analysis of the fact situations to which its [the statute's] sanctions, assertedly, may not be applied." 413 U.S. at 616, 93 S.Ct. at 2918.

Applying the above principle to this case, we noted in our opinion that Section 2.3 had been adopted from the 1940 Statement of Principles of the American Association of University Professors. Academic Freedom and Tenure: A Handbook of the American Association of University Professors 36 (1969). The Association itself had construed the language of the Section with full consideration of its effect on academic freedom. The Association asserted unequivocally that it was not directed at the substance of a teacher's remarks, and that, as a standard, it could not appropriately be invoked except "* * * when the remarks raise 'grave doubts' concerning his fitness for his position * * *." 523 F.2d at 934.

We therefore concluded that since the Association had so narrowed the language of the Section, any substantive overbreadth had been eliminated, and that what remained was well outside of *Broadrick's* requirement of "substantial overbreadth." Accordingly, we remanded to the district court with direction to hear testimony from the Regents to determine whether their construction had been the same as that of the AAUP.

FINDINGS AND DECISION ON REMAND

In May 1976, the district court proceeded to take testimony on the question whether the Regent's interpretation of Chapter 4, Section 2.3 of the University Code was the same as that of AAUP. Seven of the Regents testified that their construction was the same as that given by the AAUP. The district court thereupon found that to be the fact and, consequently, that Section 2.3 is not unconstitutionally overbroad. The court further found as a fact that the administrative hearing which the Regents had afforded Adamian comported with substantive and procedural due process.

As to Adamian's contention that his termination violated his First Amendment right to freedom of speech, the Court found the case controlled by *Pickering v. Board of Education, supra,* 391 U.S. at 573, and equated Adamian's conduct to the intentionally disruptive acts which led to the discharges involved in *Whitsel v. Southeast Local School District,* 484 F.2d 1222 (6th Cir. 1973) [faculty member encouraged high school students to resist disciplinary authority and continue unauthorized assembly protesting discharge of another teacher, suggesting the discharge had been improper]; and *Gray v. Union County Intermediate Education District,* 520 F.2d 803 (9th Cir. 1975) [untenured teacher attempted to interfere with agency-guardian's decision not to have retarded minor ward undergo a therapeutic abortion].

The district judge on remand made findings that:

> "Professor Adamian played a prominent role in unauthorized student protest activities during school hours on school property. He continued to lead raucous

> catcalls after the University President had asked the audience to be quiet. His conduct in attempting to stop the Governor's motorcade, in leading raucous catcalls, and in charging onto the field during the ceremonies encouraged students to participate in similar activities. His acts caused a substantial and material disruption of a duly constituted university function which created a danger of violence. The Court can only conclude that plaintiff's activities went beyond the mere advocacy of ideas and counselled a course of action, interfered with the regular operation of the school, and consequently was outside the protection of the First Amendment Therefore, this Court holds that plaintiff was not denied freedom of speech. *Accord, Mabey v. Reagan,* No. 74-3413 (9th Cir. June 1, 1976)."

Counsel for Adamian has argued that we should now review *de novo* the rulings of our earlier opinion. However, the scope of review is narrowed to the limitations of the remand. This Court's prior holding has become the law of the case, binding upon the present panel. *Haldane v. Ruppe,* 435 F.2d 647 (9th Cir. 1970), *cert. denied,* 402 U.S. 906 (1971); *Clinton v. Joshua Hendy Corp.,* 285 F.2d 199 (9th Cir. 1960), *cert. denied,* 366 U.S. 932 (1961). Appellant does not challenge the manner or fairness of the proceedings of the Court below.

As did the district judge, we hold that Professor Adamian was not denied freedom of speech, nor of assembly, nor equal protection. Our review of the record discloses no error below.

The judgment of the district court is affirmed.

Appendix I

United States Court of Appeals
for the Ninth Circuit

Paul S. Adamian, Appellant, vs. The Board of Regents of the University of Nevada, et al., Appellees.	No. 76-2866

[December 18, 1979]

ORDER

Appeal for the United States District Court
for the District of Nevada

Before: BREITENSTEIN and DOYLE, Circuit Judges, and POOLE*, District Judge

On October 30, 1979, appellant filed his petition for rehearing and suggestion for rehearing en banc. The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

*The Honorable Cecil F. Poole, United States District Judge for the Northern District of California, sitting by designation.

Supreme Court, U. S.
FILED
APR 11 1980

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-1440

PAUL S. ADAMIAN,
Petitioner,

vs.

DR. LOUIS E. LOMBARDI, et al.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LARRY D. LESSLY
405 Marsh Avenue
Reno, Nevada 89509
Telephone: (702) 784-6501
Attorney for Respondents

BOWNE-PERNAU WALSH • 1045 SANSOME ST. • S.F., CA 94111 • (415) 981-7682

SUBJECT INDEX

	Page
Opinions delivered below	1
Jurisdictions of this Court	2
Statutes involved	2
Questions presented for review	2
Statement of the case	2
Argument	7
Conclusion	13

TABLE OF AUTHORITIES CITED

Cases — Page

Bingham Pump Co. v. Edwards, 118 F.2d 338 (9th Cir.) cert. denied, 314 U.S. 656 (1941) 12

Caradelis v. Refineria Panama, S.A., 384 F.2d 589 (5th Cir. 1967) 12

Gooding v. Wilson, 405 U.S. 518 (1972) 8

Jablon v. Trustees of the California State Colleges, 482 F.2d 997 (9th Cir. 1973) cert. denied, 414 U.S. 1163 (1974) 9

Richardson v. Board of Regents, 70 Nev. 144, 261 P.2d 515 (1953) 8

Statutes

28 U.S.C. Section 1291 12

28 U.S.C. Section 1291(a)(1) 11

28 U.S.C. Section 1292 ..... 11, 12

Rule

Federal Rules of Civil Procedures, Rule 54(b) 11

Constitution

United States Constitution:

First Amendment 5, 6, 7

Fourteenth Amendment 5, 6, 7

Other Authorities

University Code of the University of Nevada, Chapter 4, Section 2.3 ..... 2, 3, 4, 5, 6, 7, 9, 11

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-1440

PAUL S. ADAMIAN,
Petitioner,

vs.

DR. LOUIS E. LOMBARDI, et al.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondents, Dr. Louis E. Lombardi, et al., respectfully submit their brief in opposition to petitioner's petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

OPINIONS DELIVERED BELOW

Petitioner's petition adequately sets forth references to opinions delivered in the courts below.

JURISDICTION OF THIS COURT

Petitioner's petition adequately sets forth a statement of the grounds on which the jurisdiction of this Court is invoked.

STATUTES INVOLVED

In addition to the citations set forth in petitioner's petition, Chapter 4, Section 2.3 of the University of Nevada System Code, which reads as follows, is involved:

> "The faculty member is a citizen, a member of a learned profession, and a representative of this University. When he speaks or writes as a citizen, he will be free from censorship or discipline, but his special position in the community imposes special obligations. As a man of learning and an educator, he knows that the public may judge his profession and this University by his utterances. At all times he strives to be accurate, to exercise appropriate restraint, to show respect for the opinions of others, and to make every effort to indicate that he is not a spokesman for the University."

QUESTIONS PRESENTED FOR REVIEW

Respondents take issue with the argument presented in that portion of petitioner's petition entitled "Questions Presented" and with certain misstatements of facts included in the statements of Questions Presented. Those arguments and factual misstatements will be addressed in the argument section of this brief.

STATEMENT OF THE CASE

Petitioner, a tenured assistant professor of English at the University of Nevada, Reno, participated in a demon-

stration in protest of the Cambodian invasion and the Kent State University deaths. The demonstration occurred at Governor's Day ceremonies at the campus stadium on May 5, 1970. Petitioner was instrumental in leading a disruption of the ceremonies in the stadium. The disruption was more than speech and included leading raucous noises to disrupt the ceremonies; joining a group and motioning other demonstrators onto the field, thus creating a danger of violent confrontation between two bodies of people; and attempting to stop a motorcade into the stadium. This conduct occurred after petitioner and others had been given permission to march three times around the stadium in protest during the ceremonies. This conduct is discussed in the District Court's opinion (A. F-2 to Petitioner's Petition), and the opinions of the United States Court of Appeals for the Ninth Circuit (A. E-2 and A. H-2 to Petitioner's Petition) and in the Record. (Defendants' Exhibit B, Reporter's Transcript May 24, 1976, page 4)

The Board of Regents of the University directed that charges be brought against petitioner for violation of Chapter 4, Section 2.3 of the University Code which is set forth earlier in this brief. Specifically, petitioner was charged as follows:

> "(1) On Tuesday, May 5, you did participate in an attempt to stop a motorcade in front of the Jot Travis Union Building. This motorcade was part of an official University function. (2) On the same day you did participate in the disruption of the ceremony at Mackay Stadium in connection with the Governor's review of ROTC activities on this campus." (Defendants' Exhibit A, Reporter's Transcript May 24, 1976, page 4)

A Faculty Senate Hearing Committee provided petitioner with a due process hearing on the charges. In all the proceedings in this case, no question of lack of due process or fundamental fairness in that hearing has been raised. The Hearing Committee issued its findings and decision in the matter on October 28, 1970, finding that petitioner violated that part of the Code which states that the faculty member should strive " . . . to show respect for the opinions of others." The committee also concluded that the only relevant portion of Chapter 4, Section 2.3 of the University Code is that which indicates that the faculty member should strive " . . . to exercise appropriate restraint, to show respect for the opinions of others. . . ." (Defendants' Exhibit D, Reporter's Transcript May 24, 1976, pp. 4-5) The committee recommended that petitioner not be terminated, but that he be censured and advised that "conduct which seeks to disrupt a University activity is antithetical to the principles of an open society and cannot be condoned." The committee recommended that the censure also advise petitioner that future similar conduct by petitioner shall be considered cause of dismissal from the University. (Defendants' Exhibit D, Reporter's Transcript May 24, 1976, pp. 4-5) The Regents agreed with the Hearing Committee that petitioner's conduct warranted public censure and that such conduct constituted adequate cause for termination, but disagreed that such conduct must be repeated on a second occasion before termination of employment would be justified. (Defendants' Exhibit G, Reporter's Transcript May 24, 1976, page 5) The Regents determined that under the facts as found by the Hearing Committee in its initial findings and decision and its re-

view of the findings and decision, adequate cause for termination existed. The Regents indicated that they had reviewed the transcript of the hearing and the evidence before the committee with care prior to making their decision. (Defendants' Exhibit G, 2, Reporter's Transcript May 24, 1976, page 5) The Regents' decision was issued December 12, 1970. At a hearing before Judge Turrentine in the United States District Court for the District of Nevada, on May 24, 1976, Regents testified that their decision was based *solely* upon the transcript of the hearing before the Hearing Committee and the exhibits offered at that hearing. (Reporter's Transcript May 24, 1976 and May 25, 1976, pp. 15, 19, 20, 21, 26, 29, 31, 33, 34, 37, 54)

On July 23, 1971, petitioner filed an action in the United States District Court for the District of Nevada alleging violation of his constitutional rights under the First and Fourteenth Amendments to the United States Constitution. On April 16, 1973, a memorandum decision was entered by the District Court declaring Chapter 4, Section 2.3 of the University Code unconstitutional on its face because of vagueness and overbreadth. Partial summary judgments in favor of petitioner and respondents were accordingly entered on July 20, 1973. (A. C to Petitioner's Petition) On August 30, 1973, final judgment was entered. (A. D to Petitioner's Petition) Respondents appealed that final judgment on August 30, 1973. On September 24, 1975, the United States Court of Appeals for the Ninth Circuit reversed the partial summary judgment in favor of petitioner and remanded the case to the District Court with instruction to hear testimony from the Regents in order to determine whether the Regents' construction of Chapter

4, Section 2.3 of the University Code was the same as that of the American Association of University Professors, indicating that such a construction would overcome constitutional overbreadth problems. (A. E to Petitioner's Petition) Upon remand, the Regents testified that at the time of the termination of petitioner their construction of Chapter 4, Section 2.3 of the University Code was the same as that of the American Association of University Professors. Their testimony was uncontroverted. (Defendants' Exhibit N, Reporter's Transcript May 24, 1976, page 6) The case then came to trial on May 24, 1976. The parties agreed that the only issue of fact to be determined at trial was whether the Regents' construction of Chapter 4, Section 2.3 of the University Code was the same as that of the American Association of University Professors *at the time of plaintiff's (petitioner's) termination.* (A. F-6 to Petitioner's Petition) The parties stipulated that the facts relating to the events of May 5, 1970, could be determined by the Court from the transcript of the administrative hearing and from the exhibits received in evidence. *The Court held that petitioner was entitled to a de novo trial on the merits.* (A. F-7 to Petitioner's Petition)

The following six issues of law were before the Court and were ruled upon: (1) Is Chapter 4, Section 2.3 of the University Code unconstitutionally vague or overbroad; (2) Did plaintiff's termination violate his Fourteenth Amendment right to substantive due process; (3) Did plaintiff's termination violate his Fourteenth Amendment right to procedural due process; (4) Did plaintiff's termination violate his First Amendment right to freedom of speech; (5) Did plaintiff's termination violate his First

Amendment right to freedom of assembly; and (6) Did plaintiff's termination deny him his Fourteenth Amendment right to equal protection of the laws. (A. F-6 to Petitioner's Petition) The decision of the Court was a judgment in favor of the defendants on all counts. Petitioner appealed again to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit's review of the record disclosed no error below and affirmed the judgment of the District Court. (A. H-9 to Petitioner's Petition) The Ninth Circuit refused to review de novo the rulings of its earlier opinion. Petitioner filed a petition for rehearing and suggestion for rehearing en banc on October 30, 1979. The petition for rehearing was denied, and the suggestion for rehearing en banc rejected on December 18, 1979.

ARGUMENT

Petitioner's first question presented is: May the Court of Appeals deny to an appellant his right to have decided important and substantial due process issues which are dispositive of his right to retention as a tenured professor?

The primary issue before the Ninth Circuit in petitioner's first appeal to that Court was the question of vagueness and overbreadth of Chapter 4, Section 2.3 of the University of Nevada System Code. The obvious impact of the decision in that appeal (A. E to Petitioner's Petition) is that if the Regents' construction of that provision was the same as that of the American Association of University Professors, there is no vagueness and overbreadth. The Ninth Circuit in its second appeal by petitioner refused to review de novo the ruling of that opinion, holding that the prior ruling had become the law of the case, binding

upon the present panel based upon the evidentiary hearing conducted after remand in the first appeal, wherein testimony of the Regents indicated that the constructions of the Code provision by the Regents and the American Association of University Professors were the same at the time petitioner was dismissed from his position. As stated earlier herein, prior to his second appeal to the Ninth Circuit, petitioner received a trial de novo in the District Court, on six issues of law, including all of the issues which he argues at page 15 of his petition have never been judicially determined. They were indeed determined against him in the District Court. The Ninth Circuit, in the second appeal, stated that its review of the record below disclosed no error below and affirmed the judgment of the District Court. (A. H-9 to Petitioner's Petition)

Petitioner's second question presented is: Are the individual regents or the Nevada Courts the authoritative agency to construe statutes in the form of a University Code; and if the regents have authority to make such construction, is it binding when made years after the "extramural utterances" complained of were engaged in?

The University of Nevada System is an agency of the State of Nevada. University Code provisions have the force and effect of statute. *Richardson v. Board of Regents,* 70 Nev. 144, 261 P.2d 515 (1953). They are not, however, statutes, but regulations of a state agency. As such, courts are required to base their judgment as to their facial validity on their meaning as authoritatively construed by a state court or *agency. Gooding v. Wilson,* 405 U.S. 518, 520 (1972). The Board of Regents construed the last

sentence of Chapter 4, Section 2.3 of the University Code, which reads "at all times he strives to be accurate, to exercise appropriate restraint, to show respect for the opinion of others, and to make every effort to indicate that he is not a spokesman for this University," as stating causes for dismissal. Great deference must, therefore, be given to this construction of the regulations by the state agency which issues and enforces it. *Jablon v. Trustees of the California State Colleges,* 482 F.2d 997, 999 (9th Cir. 1973) cert. denied, 414 U.S. 1163 (1974). The second portion of petitioner's question presented is easily answered. That portion of the question states, ". . . and if the regents have authority to make such construction, is it binding when made years after the 'extramural utterances' complained of were engaged in." As indicated by the opinion of the District Court below, petitioner agreed that the only issue of fact to be determined at trial was whether the Board of Regents' construction of Chapter 4, Section 2.3 of the University Code was the same as that of the American Association of University Professors *at the time of plaintiff's termination.* (A. D-6 to Petitioner's Petition) The testimony of regents at the trial de novo on the merits at the District Court level in the Reporter's Transcript of Proceedings on Appeal, May 24, 1976, and May 25, 1976, as stated earlier herein, clearly indicates that their construction of the Code provision was the same as that of the American Association of University Professors at the time of the dismissal of petitioner. That testimony was uncontroverted. There has never been any question as to when the critical construction of the Code provision by the Regents had to be made.

Petitioner's third question presented is: After acquittal of charges arising out of war protest by a Hearing Committee empanel [sic] to try accused college professor, does the governing board of the University have the power to retry the professor in the presence of a direct, unretracted statement by a member of the board that the board was motivated by a desire to punish, deter and discourage further war protests at the University?

Petitioner was not acquitted of charges ensuing out of war protests by the Hearing Committee. The decision of the Hearing Committee is adequately discussed in the Statement of the Case, above. The governing board of the University did not "retry the professor." It reviewed the transcript of testimony taken by the Hearing Committee and the evidence presented to that committee. As set forth in the Statement of the Case above, the Board based its decision *solely* upon that transcript and evidence and not upon any statement by any member of the Board of Regents.

Petitioner's fourth question presented is: May a limiting construction on one portion of a statute cure vagueness and overbreadth of another portion of the statute?

Petitioner argues that the limiting construction by the AAUP of a portion of the Code provision involved, curing facial invalidity, dealt with "appropriate restraint." He argues further that petitioner was found to have failed to respect the opinion of others, another part of the Code provision. Petitioner was found by the Faculty Senate Hearing Committee to have violated that portion of the Code provision regarding failure to respect the opinion

of others. The committee found the entire section which reads ". . . to exercise appropriate restraint, to show respect for the opinions of others . . ." to be the relevant portion of Chapter 4, Section 2.3 of the University Code. (Defendants' Exhibit D, 5, Reporter's Transcript May 24, 1976, pp. 4-5) The Board of Regents found adequate cause existing for termination of petitioner's employment based upon its review of the transcript of proceedings before the Faculty Senate Hearing Committee and evidence presented in its proceedings. As stated by the Ninth Circuit in its decision on the first appeal by petitioner, the Regents construed the language of Chapter 4, Section 2.3 of the University Code "at all times he strives to be accurate, to exercise appropriate restraint, to show respect for the opinions of others, and to make every effort to indicate that he is not a spokesman for this University" to state adequate cause for dismissal. Petitioner was specifically charged with violation of Chapter 4, Section 2.3. The limiting construction of the section by the American Association of University Professors is, therefore, directly on point.

Petitioner's fifth question presented is: Under 28 U.S.C. § 1292, does the time for filing an appeal commence again after the filing of a restated rule 54(b) order in the form appended?

It should also be noted that petitioner argues that the procedural and jurisdictional issue of whether an appeal time can be revitalized by a court's filing a "restated" summary judgment should be determined by the Supreme Court in the interest of Circuit uniformity without benefit of

citation of any authority showing there is not Circuit uniformity.

As stated by the Ninth Circuit in the first appeal in this case (A. E-3 to Petitioner's Petition), the District Court's first order granting an injunction was an appealable interlocutory order. 28 U.S.C. § 1291(a)(1). An interlocutory appeal is permissive, not mandatory. The Regents were free to await the August final judgment and to appeal under 28 U.S.C. § 1291. *Caradelis v. Refineria Panama, S.A.*, 384 F.2d 589, 591 n. 1 (5th Cir. 1967); *Bingham Pump Co. v. Edwards,* 118 F.2d 338, 339 (9th Cir.) cert. denied, 314 U.S. 656 (1941). Petitioner has apparently disregarded entirely 28 U.S.C. § 1291 and relied entirely upon 28 U.S.C. § 1292. This issue was addressed in the first appeal to the Ninth Circuit. As stated earlier herein, subsequent to the decision of the Ninth Circuit in that first appeal remanding the case, petitioner was granted a trial de novo on the merits, had a decision rendered against him on all six issues before the District Court in that trial de novo and appealed that decision to the Ninth Circuit in the second appeal of the case. Although there are no defects in the first appeal procedure, even if there were one based on petitioner's argument, how can he now complain after a trial de novo was granted him after the first appeal and he appealed the decision against him in that trial de novo? Any alleged defect in appeal procedure in the first appeal has obviously been cured.

CONCLUSION

Petitioner has had all of his constitutional rights judicially determined by the federal courts over a period of almost ten years. There is no indication in this petition that the Ninth Circuit has decided an important state question in a way in conflict with applicable state law. There is no indication that the Ninth Circuit has decided an important question of federal law which has not been, but should be, settled by the Supreme Court or has decided a federal question in a way in conflict with applicable decisions of the Supreme Court. No exercise of the Supreme Court's power of supervision is warranted.

Petitioner's petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit should be denied.

LARRY D. LESSLY
Attorney for Respondents